(11)

No. 92-1-CFX
Status: GRANTED

Title: Lynwood Moreau, etc., et al., Petitioners
v.
Johnny Klevenhagen, Sheriff, Harris County, Texas, et al.

Docketed:
June 29, 1992

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Leibig,Michael T.

Counsel for respondent: Steicher,Harold M.

also 40 copies of appendix

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1992	G	Petition for writ of certiorari filed.
2	Jun 29 1992		Appendix of petitioner filed.
4	Jul 20 1992		Order extending time to file response to petition until September 1, 1992.
6	Aug 31 1992	X	Brief of respondents Johnny Klevenhagen, et al. in opposition filed.
5	Sep 2 1992		DISTRIBUTED. September 28, 1992
7	Oct 5 1992		Petition GRANTED.
			**********
9	Nov 4 1992		Order extending time to file brief of petitioner on the merits until November 25, 1992.
10	Nov 4 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
17	Nov 23 1992		Record filed.
		*	Certified proceedings United States District Court, Southern District of Texas.
11	Nov 25 1992		Brief of petitioners Lynwood Moreau, et al. filed.
12	Nov 25 1992		Joint appendix filed.
15	Dec 18 1992		Order extending time to file brief of respondent on the merits until January 15, 1993.
16	Dec 28 1992		SET FOR ARGUMENT MONDAY, MARCH 1, 1993. (3RD CASE).
18	Jan 8 1993		Brief amicus curiae of Missouri filed.
20	Jan 14 1993		Brief amici curiae of Texas Municipal League, et al. filed.
19	Jan 15 1993		Brief of respondents Johnny Klevenhagen, et al. filed.
21	Jan 15 1993		Brief amici curiae of National Association of Counties, et al. filed.
22	Jan 19 1993		LODGING consisting of 20 copies of U.S. Advisory Commission report submitted by amici National Assn. of Counties, et al. received.
23	Jan 22 1993		CIRCULATED.
24	Feb 18 1993	X	Reply brief of petitioner filed.
25	Mar 1 1993		ARGUED.

92-1

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. LEIBIG
(Counsel of Record)
INTERNATIONAL UNION OF
POLICE ASSOCIATIONS,
AFL-CIO, General Counsel
ZWERDLING, PAUL, LEIBIG, KAHN,
THOMPSON & DRIESEN, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000
Counsel for Lynwood Moreau and all other Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act, as amended, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid in cash time and a half. Under Section 207(o), a public employer may provide compensatory time in lieu of overtime pay in cash pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A).]

The question presented here is whether a public employer in a state which does not provide for NLRB-type collective bargaining who refuses to respond to or to work out a compensatory time agreement with a representative designated by its employees for that purpose may nonetheless unilaterally implement and follow a compensatory time program?

PARTIES TO THE PROCEEDING BELOW

I.

PLAINTIFFS APPELLANTS PETITIONERS

Lynwood Moreau individually and as president, Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, and as FLSA REPRESENTATIVE of 37 similarly situated consenting Harris County Law Enforcement Officers.

The Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, on its own behalf, and as an FLSA representative of the 400 Deputy Sheriffs it represents.

Kenneth O. Adams
Daniel Almendarez
Shirley Ashcraft
Jeron McNeil Barnett, Sr.
Humberto Rios Barrera
M. Barron
Mark D. Baughman
Bradley T. Bennett
Richard M. Blackwell
Alton W. Bowdoin
Bruce Breckenridge
Richard E. Burns
Don E. Bynum
Chuck Calvit
Robert Casey
Richard A. Castillo
John Robert Chaney
Paul Steven Cordova
John F. Costa
Carl Davis, Jr.
John P. Denholm
Dan B. Daiz
Nelda DeLaCruz
Chris E. Dempsey
James Dewey
Feliz Dlouly, III
Karen Douglas
Donald R. Downey
Grady E. Dukes
Ray A. Dupont
Freddy G. J. Lafuente
J. J. Freeze
Kim L. Fuller
Manuel R. Garza
Thomas E. Goodfellow
Michael Gregory Gonzales
Vincent A. Gonzales
P. R. Halfin, Jr.
James H. Happel
Mona F. Hawk
R. L. Hassel
Neal Hines
James M. Hoffman
Annette M. Horton
Larry D. Howell
Vernon Levone James
Joe Franklin
Jimmie L. Jones

Patrick A. Kaptchinskie
Warren A. Kelly, Jr.
James Paul Kershaw, Jr.
Janet L. King
Margaret L. Knigge
Dennis R. Koch
Cassandra Leach
Brian D. Leighton
Barbara Leitner
Vernon Scott Lemons, Jr.
Ron Lenard
Kenneth V. Liquori
Robert Richard Long
David Lopez
Leonel Martinez
Joe Clinton Mayes
Russell Lee Mayfield
James Kevin McGehee
Eugene T. Merritt, Jr.
Marty M. Mingo
Diane L. Mireles
L.V. Moreau
Joe A. Munoz
John M. Owens
Barnard G. Palmer
Gary Wayne Phillips
Thomas Wayne Phillips
Gregory D. Pinkins
Larry Pohlmeyer
Joshua Todd Porter
Carlos M. Ramirez
Michael Rankin
James W. Redd
James A. Reed
James C. Reynolds, III
Donald L. Robinson
R'Wanda Sampson
Michael Wayne Simpson
James W. Sims
M. J. Smith
Russell Rocamontes
Stephen Wayne Russell
William J. Ryan
Andres Sanchez
Denise A. Schreiber
J. C. Seckler
Lawrence R. Seward
Donald Shaver
James K. Shipley
Michael D. Sieck
James M. Siegel
Effie Louise Skinner
Patrick Spacek
Pamela Stanford
Rickye Stanford
Terry Stolitza
Rachel Tolbert
Dennis J. Tones
Robert Thomas Tonry
Thurman T. Tyndall
Mark A. Walker
Walter L. Walker
Roger D. Wedgeworth
Calvin Gary Wilson
Terry Allen Wooten

II.

DEFENDANTS/APPELLEES/RESPONDENTS

Johnny Klevenhagen, Sheriff of Harris County, Texas.

Judge Jon Lindsay, Harris County Commissioner, Harris County, Texas.

Harris County, Texas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ———

LYNWOOD MOREAU, *et al.*,
Petitioners,
v.
JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Lynwood Moreau, et al., the plaintiffs in the District Court and the appellants in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Lynwood Moreau, et al., v. Johnny Klevenhagen, et al.*, 5th Cir. No. 90-2833 (March 31, 1992).

OPINIONS BELOW

The Court of Appeals opinion is reported at 956 F.2d 516 (5th Cir. 1992) and is reproduced as Appendix A (pp. 1a-14a) in the separately bound Appendix to this *certiorari* petition (hereafter "Pet. App.").

The District Court's memorandum and order denying plaintiffs' motion for partial summary judgment and granting defendants motion for summary judgment, dated August 29, 1990, is unreported and is reproduced

as Appendix B (Pet. App. 15a-24a). The District Court's final judgment dated August 29, 1990 is unpublished and is reproduced as Appendix C (Pet. App. 25a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on March 31, 1992. The Judgment is reproduced as Appendix D (Pet. App. 26a-27a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS

Section 207(o) of the Fair Labor Standards Act, 29 U.S.C. Section 207(o), is reproduced as Appendix E (Pet. App. 28a-29a).

The Secretary of Labor's regulations set out at 29 C.F.R. Section 553.23, are reproduced in Appendix E (Pet. App. 30a-35a).

STATEMENT OF THE CASE

1. The Fair Labor Standards Act (hereafter "FLSA"), as amended, provides that employers must pay their employees one and one half times the employee's normal pay for overtime worked. *See* FLSA Section 7, 29 U.S.C. Section 207. Under certain stated circumstances, Section 207(o) will allow *public* employers to substitute "compensatory time"—paid time off—for the cash payments otherwise required by the Act for overtime worked. Most pertinently, Section 207(o)(2)(A)(i) states that compensatory time may be provided pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . . ."

The regulations adopted by the Secretary of Labor to implement FLSA Section 207(o) provide, in turn, that "the representative need not be a formal or recognized

bargaining agent as long as the representative is designated by the employees." Pet. App. 31a. The regulations add ". . . *Where employees have a representative,* the agreement or understanding concerning the use of compensatory time *must* be between the representative and the public agency." Pet. App. 31a (emphasis added).

2. The Harris County Deputy Sheriffs, who are petitioners here, are employed by the Harris County Sheriff Department and the Sheriff of Harris County, Johnny Klevenhagen. Petitioners have designated the Harris County Deputy Sheriffs Union, Local 154 and/or Eugene T Merritt, Jr. or Lynwood Moreau[1] as their representatives for the purposes of reaching an FLSA Section 207(o) compensatory time agreement with their public employer. Local 154 has represented deputy sheriffs for more than five years in grievance proceedings concerning working conditions. Local 154 has also reached an agreement with the County which provides for the deduction of union dues through the County payroll.

Harris County, however, has refused to enter into any discussion of agreement with Local 154 concerning overtime compensation. The Harris County Sheriff's Department instead has unilaterally instituted and maintained an overtime policy which provides for compensatory time in lieu of cash payments. Under this unilaterally imposed system, deputy sheriffs receive up to 240 hours of compensatory time for their work.

3. Petitioners instituted this suit in the United States District Court for Southern District of Texas on April 15, 1988, after the County—despite protests by petitioners—made clear that it would adhere to its position of refusing to discuss compensatory time arrangements with the Local 154. Petitioners' Complaint challenged the legality of the County's requirement that deputy sheriff's

[1] On April 15, 1988, when the suit was originally brought Eugene T. Merritt, Jr. was president of the union. At the time of the appeal, Lynwood Moreau serves as president of the Union.

accept compensatory time off in lieu of overtime pay despite their designation of a representative and despite the absence of any agreement with that representative.

The court below upheld the Harris County program on the grounds that state law does not authorize Harris County to enter into a bilateral agreement with the employees' representatives, and therefore, no Section 207(o) agreement was required. Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

A SEVERE CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE APPLICATION OF SECTION 207(o) OF THE FAIR LABOR STANDARDS ACT.

I. POST-*GARCIA* LEGISLATIVE BACKGROUND.

As originally enacted in 1938, the Fair Labor Standards Act ("FLSA") applied only to private employers. Beginning in 1966, Congress expanded the coverage of the FLSA to protect state and local government employees as well. Congress' assertion of a Commerce Clause power to set basic labor standards—such as those set out in the Fair Labor Standards Act, as amended—in the state and local government sector as well as in the private sector has raised a contentious federalism dispute. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). At least in part this dispute has stemmed from the concern that Congress could not—or would not—recognize and give adequate consideration to the special attributes of the state and local governments and the special character of the public employer-public employee relationship.

In a direct response to these concerns, the 1985 Congress amended the Fair Labor Standards Act insofar as that Act applies to the public sector. P.L. 99-150; 99

Stat. 790. And Congress acted only after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs. Indeed, Congress went so far as to mandate the issuance of regulations necessary to implement the 1985 FLSA amendments. P.L. 99-150, § 6. The Department of Labor, in turn, conducted an extensive rulemaking proceeding and solicited and carefully considered the views of the state and local governments and of public employees. *See* 52 Fed. Reg. 2012-15 (1987).

After the *Garcia* decision, many public employers and their organizations sought congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In hearings held by House and Senate committees, public employees and their representatives made the contrary arguments that compliance with *Garcia* would not be excessively costly and that it was only fair for public employees to enjoy the same labor standards as virtually all private employees.

At the invitation of Congressional leaders, the public-employer and pubic-employee groups met and proposed a bill which was the product of intense negotiations between all the affected parties and of extensive compromise. *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 FLSA amendments). The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO, [the International Union of Police Associations], and the Fraternal Order of Police," 113 Cong. Rec. S14047 (Sen. Nickles); *accord* 131 Cong. Rec. H9238 (Rep. Hawkins). And, with such broad support, the 1985 FLSA Amendments were quickly passed by Congress.

The relevant provisions of Section 207(o) of the statute provide that a public employer may provide compensatory time "*only* pursuant to"

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A).]

Section 207(o) further specifies that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. Section 207(o).]

These are the only circumstances under which a public employer is permitted to deviate from the basic rule that employers are required to pay their employees in cash for all overtime worked.

Through promulgating the regulations, the Department of Labor determined that an agreement or understanding reached prior to the performance of work is a prerequisite to granting compensatory time in lieu of overtime payment in cash. The regulations emphasize

> Where employees have a representative, the agreement of understanding concerning the use of compensatory time must be between the representative and the public agency . . . . In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. Section 553.23(b)(1).]

Section 207(o) read together with these regulations seemed clear. Nonetheless, a deep disagreement has developed as to a critical aspect of the compromise forged in the 1985 FLSA amendments and elaborated in the regulations on those amendments: the scope of the provision requiring public employers who desire to provide compensatory time in lieu of overtime pay to reach an agreement on compensatory time with the representative designated by their employees. This disagreement concerns the interplay between the federal law setting the conditions for the provision of compensatory time and the state law setting the conditions on which public employers may enter into agreements with their employees.

The resulting litigation has led to a clear and patent conflict in the circuits with the result that the rights of public employees and duties of public employers with respect to overtime compensation now vary widely depending on the circuit in which the employment occurs. As stated by Chief Judge Ervin of the Fourth Circuit, it is unlikely "that Congress intended for the protections afforded by the [FLSA] to hinge upon the accident of the state in which the employee happens to reside." *Wilson v. City of Charlotte*, Slip Op. No. 89-2388 (4th Cir. May 8, 1992) (Ervin, C.J., dissenting). It is imperative that this Court resolve the conflict of the circuits.

II. THE CONFLICT IN THE CIRCUITS.

A. The Tenth Circuit: *West Adams.*

The first court of appeals to interpret FLSA Section 207(o) was the Tenth Circuit in *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). The West Adams Fire Department—a local government employer in Colorado—refused to enter into an FLSA Section 207(o)(2)(A)(i) compensatory time agreement with the employee designated representative. The Fire District averred that it was precluded from entering into such an agreement since Colorado—like Texas

here—allows each political subdivision to determine whether or not it will recognize employees' representatives for collective bargaining and it had chosen not to enter into any agreements with employee groups or representatives.[2] The Fire District further argued that since state law precluded it from entering into an agreement with the representative under Section 207(o)(2)(A)(i), that it was therefore free under Section 207(o)(2)(A)(ii) to follow its past practices regarding compensatory time regardless of its employees efforts to designate a representative.

The Tenth Circuit rejected this argument concluding that under the FLSA, once employees designate a representative for purposes of reaching a Section 207(o)(2)(A)(i) agreement, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement with that representative. Section 207(o)(2)(A)(ii)'s permission to provide compensatory time pursuant to individual agreements or past practices, said the Tenth Circuit, applies *only* where the employees in question have *not* designated a representative. The Tenth Circuit further recognized that a public employer is under no obligation to reach an agreement or understanding or even engage in any discussions with its employees' representative; but, said that court, the consequences of the employer's refusal is that the employer must, like all other employers, pay cash overtime for required overtime work. 877 F.2d at 820, n.7.

The Tenth Circuit principally relied on the Department of Labor's regulations which, as previously indicated, assert that the public employer must come to an

[2] Under Colorado law, governmental entities have a right to refuse to recognize labor organizations and to refuse to engage in collective bargaining or enter into any agreements whatsoever with such organizations. *See City and County of Denver v. Denver Fire Fighters*, 663 P.2d 1032, 1036-1039 (Colo. 1983); *Littleton Education Assn. v. Arapaho County School District No. 6*, 191 Colo. 411, 553 P.2d 793 (1976).

agreement with a designated representative even if the representative was not formally recognized. The Tenth Circuit concluded that the regulation makes two irrefutable points:

> First, if employees have a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. Second, employees are deemd to be represented under Section 207(o) if they merely designate a representative; the representative need not be recognized by the employer. [877 F.2d at 818.]

Noting this Court's mandate in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the court recognized that "the Department's construction of the Section, if reasonable, is controlling even if there is an equally reasonable construction." 877 F.2d at 817. The court looked first to determine if the statutory language was ambiguous and second if the administrative construction was a reasonable resolution of the ambiguity.

As to the ambiguity of the statutory language, the Tenth Circuit stated

> We find the language of Section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [877 F.2d at 816-17.]

Since the Tenth Circuit found the language to be ambiguous, it next turned to the administrative interpretation to determine whether it is reasonable. The Tenth Circuit noted that all relevant legislative history materials support the Labor Department's view that Section 207(o)(2)(A)(ii) only applies where the employees have

no representative. *See* 877 F.2d at 819 (quoting S. Rep. No. 99-159, 99th Cong., 1st Sess. 10-11 (1985) and H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 20 (1985)). The Tenth Circuit further found that the Labor Department's view that employees are represented when they have simply designated a representative is a reasonable construction of the legislation because it is fully supported by the House Report.

B. The Fourth Circuit: *Abbott*.

The Fourth Circuit has rendered two opinions on this issue. The first Fourth Circuit opinion on the scope of Section 207(o)(2)(A) is *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 854 (1990). *Abbott* cannot be reconciled with *West Adams*. The only similarity between the Fourth Circuit's interpretation and that of the Tenth Circuit is the acceptance of the proposition that when employees have a representative, a public employer may only provide compensatory time pursuant to an agreement with the employees' representative.

The Fourth Circuit focused on two factors in construing Section 207(o), neither of which is adverted to in the statute or in the Labor Department's regulations. First, the Fourth Circuit placed a great deal of emphasis on Virginia's state law which prohibits agreements with public employee collective bargaining representatives. Second, the Fourth Circuit was persuaded by the public employer's policy of allowing each individual employee who worked overtime an *absolute choice* between overtime pay and compensatory time.

In emphasizing the state law, the Fourth Circuit relied on the preamble of the Labor Department's regulations.

> It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.[3]

On the basis of the foregoing, the Fourth Circuit concluded that Section 207(o)(2)(A)(i) does not apply where state law prohibits agreements with employee representatives, since otherwise the statute would "preempt," rather than incorporate, state law. The Fourth Circuit distinguished the Tenth Circuit's *West Adams* decision on the ground that Virginia law prohibits agreements with public employee collective bargaining representatives while Colorado law allows local governments to choose whether to engage in collective bargaining or not. The Fourth Circuit did not explain, however, why a state decision to prohibit collective bargaining should operate to alter the scope of Section 207(o)(2)(A)(i) while a state decision to delegate that decision to a local government, which in turn determines to deny its employees collective bargaining rights, should not.

Regarding the fact that Virginia Beach offered individual employees a choice of overtime pay or compensatory time, the Fourth Circuit stated that respondent had conformed to the underlying policies of FLSA Section 207(o) which "provides flexibility to state and local government employers and an element of a choice to their employees regarding compensation for statutory over time hours worked by covered employees." 879 F.2d at 136-37 (quoting H.R. Rep. No. 99-331, *supra*). However, that court did not explain how this factor fits into Section 207(o)'s language or structure.[4]

---

[3] The Fourth Circuit did not cite or discuss other portions of the preamble or of the regulations which belie that court's reading of the regulations.

[4] Significantly, neither of the factors relied on in *Abbott* are present in the instant case. Texas does not absolutely prohibit local governments from collective bargaining. *See* the Texas Fire and Police Employee Relation Act, Tex. Rev. Civ. Stat. Ann., Art. 5154c-1 (Vernon 1987). Second, unlike in Virginia, Harris County

C. The Eleventh Circuit: *Dillard*.

The Eleventh Circuit in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990) reached yet another interpretation of the statute. The Eleventh Circuit, recognizing dissention among the circuits, claimed that it refused to follow the Tenth Circuit and that it preferred the Fourth Circuit's *Abbott* interpretation. However, the Eleventh Circuit then declined to follow the *Abbott* rationale completely and instead offered an alternative construction. The only interpretation the *Dillard* and the *Abbott* courts agreed upon was that if state law prohibits collective bargaining, the public employer is precluded from entering into any type of agreement or understanding with the employees' representatives.

The differences between the Eleventh Circuit opinion and Fourth Circuit's *Abbott* opinion emphasize the stark conflict between the circuits. Unlike the *Abbott* court which found the presence of flexibility and absolute employee choice in the employer's policy dispositive, the *Dillard* court averred that the FLSA gave states the "upper hand" in deciding how to compensate for overtime work. Thus, Georgia's unilateral mandate of no overtime cash was approved by *Dillard* even when it would have violated the *Abbott* "absolute choice of cash" rule.

The Eleventh Circuit also took the position that according to the "plain language" of the statute, Section 207(o)(2)(A)(i) applies only where an agreement al-

---

Deputy Sheriffs are not guaranteed an absolute right to choose cash over compensation time for their overtime work. Compensation time is a condition of employment in Harris County. Illustrative of the disarray in the circuits is the fact that had the rationale applied in *Abbott* been applied to the facts at hand, the outcome in this case would be very different. Nevertheless, the Fifth Circuit reached the same final conclusion (public employers can impose compensation time in lieu of cash payments without agreeing with the employees representatives).

lowing for compensatory time has already been reached between an employer and a representative. In other words, the applicability of subclause (i) depends, not on whether there is a representative as the other circuits contend, but on whether there is an agreement. The court concluded that whenever there is no agreement, whether the employees have designated a representative or not, the employer is free to implement compensatory time programs under Section 207(o)(2)(A)(ii).

This position is, of course, in direct conflict with *West Adams* and *Abbott*. Each of those decisions accepted that where employees have a representative, the employer must reach an agreement with that representative or pay money for overtime; the only point of disagreement among those circuits was determining when employees can be said to have a representative. *Dillard* also conflicts with the Legislative History and the Administrative interpretation. *See* 29 C.F.R. 553.23(b)(1); S. Rep. No. 99-159, *supra*, at 10-22, H.R. Rep. No. 99-331, *supra*, at 20. Finally, the Eleventh Circuit also asserted that the language of the statute is clear. Nevertheless, the Tenth Circuit painstakingly set out how the statute is ambiguous. Thus the *Dillard* decision delineated yet a third construction of Section 207(o) of the FLSA.

D. The Ninth Circuit: *Nevada Highway Patrol*.

The Ninth Circuit has taken still another view of the scope of Section 207(o)(2)(A). *Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir. 1990). Like the Tenth and Fourth Circuits, the Ninth Circuit accepts that once employees have a representative, Section 207(o)(2)(A)(i) permits compensatory time *only* through an agreement or understanding between the employer and the representative. The Ninth Circuit, like the Fourth Circuit, deviated from the Tenth in holding that state law plays a role in determining whether the employees have a designated representative. However, the

Ninth Circuit recognized that even when state law precludes collective bargaining, the state may allow representation, informal agreements and understandings which would satisfy Section 207(o)(2)(A)(i).

On this basis, and on the basis that the state had recognized one labor organization as the employee's representatives for the purpose of "representing its members for discussion of conditions of employment," the court concluded that the labor organization is an informal representative within the meaning of Section 207(o)(2)(A)(i). The court determined that compensatory time could not be provided absent an agreement with that labor organization.[5]

E. The Fifth Circuit: *Moreau*.

The Fifth Circuit decision in the instant case also cannot be reconciled with the other circuits' decisions. As indicated earlier, political subdivisions in Texas, like those in Colorado, may opt to enter into collective bargaining agreements with a labor organization by adopting the Fire and Police Employee Relations Act ("FPERA"). Harris County has not adopted this Act. As a result, the Fifth Circuit determined that "Texas law [would] prohibit[] any bilateral agreement between [the county] and a bargaining agent whether the agreement is labeled a collective bargaining agreement or something else." Pet. App. 7a.

The Fifth Circuit claimed that it joined the Fourth and Eleventh Circuits in holding that when state law pre-

[5] The facts in Nevada are nearly identical to the present situation in Texas. Here, Local 154 is recognized generally as the representative of its members with regard to their work place concerns by the Harris County Sheriff, and under Texas law (Tex. Rev. Civ. Stat. Ann. Art. 5154c Section 6). Consequently, under the Ninth Circuit ruling, Harris County should have been obligated to reach an agreement with Plaintiffs before providing compensatory time. The Fifth Circuit's contrary conclusion, as will be explained below, embodies the dissension among the circuits.

cludes a public employer from entering into an agreement, subclause (i) is inapplicable. However, as previously noted, the Fourth Circuit did not reach such a conclusion. In fact, the Fourth Circuit asserted that the distinguishing factor between *Abbott* and *West Adams* was that Virginia, unlike Colorado (and Texas), does not give its political subdivisions any choice in determining whether to bargain or not. The Fourth Circuit suggested that if the public employer has an option to enter into collective bargaining then subclause (i) would apply regardless of whether the option was selected.

Furthermore, the decision below is in direct conflict with all of the other circuits. The Tenth, Ninth, and Fourth Circuits all accepted that if the employees had a representative, subclause (i) requires the employer to reach an agreement with that representative or pay money for overtime worked.[6] The Eleventh Circuit stressed that despite a state's no collective bargaining law, subclause (i) would apply if an agreement between the employer and the representative already existed because the determinative factor is the existence of an agreement not the existence of a representative. On the other hand, the Fifth Circuit insisted that under no conditions may a political subdivision which has not adopted the FPERA enter into an agreement with the employees' representative. The Fifth Circuit also varies from the Fourth because the Harris County Deputy Sheriffs do not enjoy the absolute right to cash which the Fourth Circuit's *Abbott* would require.

F. The Fourth Circuit: *Wilson*.

The dissention in the circuits continues even beyond this case. A few months after *Moreau* was decided, the Fourth Circuit rendered its second opinion on this issue.

[6] As explained above, the circuits disagree when it comes to determining whether the employees have a representative for purposes of Section 207(o)(2)(A)(i).

Wilson v. City of Charlotte, Slip Op. No. 89-2388 (4th Cir. May 8, 1992). Demonstrative of the complete confusion among the circuits, *Wilson* conflicts not only with the other circuits but with the Fourth Circuit's own precedent in *Abbott*. Moreover, in *Wilson*, which was rendered by the full court, *en banc*, the court itself could not reach a majority interpretation.

In a six to one to five opinion, the Fourth Circuit appeared to disagree with its previous holding in *Abbott* and agree with *Dillard* that the dispositive issue in determining if subclause (i) applies is the existence of an agreement and not the existence of a designated representative. In *Wilson*, the plaintiffs were all hired before April 15, 1986. The employees had designated a representative prior to that date. Nevertheless, the city unilaterally imposed a compensatory time policy instead of a cash payment policy for overtime worked. The court found that the city was not in violation of the FLSA because the compensatory time policy existed before April 15, 1986, and therefore, according to the statute, it constituted an agreement.

Six members of the court found that the city did not have to negotiate with the employees' representative concerning its compensation time policy because the state does not allow for such agreements. As a result of this state law, the plurality argued, the employees could not have a representative within the meaning of subclause (i). In a footnote, these six judges declined to decide the meaning of the regulation had the employees had a representative.

The concurrence by Judge Luttig, on the other hand, averred that the plurality offered no support for its definition of a representative. Judge Luttig, agreeing with the five dissenters, explained that the regulation expressly stated that the representative can be informal. He added that "North Carolina's prohibition against collective bargaining by public agencies . . . has no bearing whatsoever

on whether the local is a 'representative' within the meaning of the regulation." Slip Op. No. 89-2388 at 13; Pet. App. 172a (Luttig, J., concurring).

However, the Judge then adopted a new interpretation of the statute. He averred that the public employer is in compliance provided it reaches an agreement with either the individual employee or the representative. In addition, Judge Luttig contended, the existence of a representative does not dictate with whom the employer must agree.

Five judges dissented in an opinion written by Chief Judge Ervin. The dissenters, like the majority, did not adopt the circuit's precedent in *Abbott*. Agreeing largely with the Tenth Circuit's *West Adams* opinion, Chief Judge Ervin asserted that the majority in *Wilson* created the

> inequitable result of resting the rights of public employees under the federal law that purports to protect them, the Fair Labor Standards Act . . . , on the idiosyncracies of state legislatures. . . . I do not think that Congress intended for the protections afforded by the Act to hinge upon the accident of the state in which the employee happens to reside. I also do not think that Congress intended to allow a public employer to force an individual employee to accept compensatory time instead of cash for overtime worked as a condition of taking the job when the employees have designated a representative to negotiate jointly for them. [Slip Op. No. 89-2388 at 18; Pet. App. 178a. (Ervin, C.J., dissenting).]

The dissent noted that contrary to the assertions of the Eleventh Circuit, the language of the statute is ambiguous. It explained that subclause (ii) which refers to "employees not covered by subclause (i)" could refer to those employees who lack an agreement or those who lack a representative. Both interpretations have been adopted by various circuits which further illustrates the ambiguity. Relying on this Court's opinion in *Chevron, supra*,

the dissent explained that to resolve the ambiguity, the courts are bound to accept the Department of Labor's interpretation, provided it is reasonable. Chief Judge Ervin found that the regulation was clearly supported by the legislative history, and therefore, must be reasonable. According to Chief Judge Ervin, the regulation enunciates two important meanings: first, if the employees select a representative, the employer must reach an agreement with the representative in order to grant compensatory time[7]; and second, employees are represented once they designate a representative regardless of whether the employer recognizes the representative or not.

Chief Judge Ervin specified that the statute applies even when the state prohibits collective bargaining. "The fact that Congress included the possibility of an agreement being in some other form indicates that this agreement could be reached in states like North Carolina that do not allow public collective bargaining." Slip. Op. No. 89-2388 at 22; Pet. App. 182a (Ervin, C.J., dissenting). He concluded that

> the practical result of the majority's decision is that the City can refuse to bargain with the employees' representative with the excuse that state law requires this result, thus unilaterally eviscerating the employees' choice in the matter and effectively circumventing the requirements of the Fair Labor Standards Act. According to the majority, employees who reside in states that prohibit public agencies from engaging in collective bargaining have fewer rights under federal law than their counterparts who live in states with no such prohibition. I do not believe that Congress intended for employees' rights under the [FLSA] to hinge upon the mere fortuity of geography. Slip Op. No. 89-2388 at 23; Pet. App. 184a (Ervin, C.J., dissenting).]

[7] However, the dissent clarified, employers can still choose not to enter into any agreements with anyone. If public employers choose this option they must pay their employees in cash for overtime worked.

As the foregoing demonstrates, the decisions of the Tenth, Ninth, Fourth, Eleventh and Fifth Circuits on the meaning of Section 207(o) leave the law in total disarray. Review by this Court is urgently required.

III. THE DECISION BELOW.

Review by this Court is further necessary because of the erroneous interpretation of this important question of federal law. The Fifth Circuit's decision below is not only in conflict with every other circuit which has decided this issue, as we will now show, it is also incorrect. Apparently ignoring the Department of Labor's regulations, the Fifth Circuit reached a decision which contradicts the reasonable interpretation adopted by the Labor Department regulations.

According to the court below, Section 207(o)(2)(A)(i) only applies where state law allows public employers to enter into collective bargaining with its employees. In Texas, a local Fire or Police Department is forbidden from engaging in collective bargaining unless the political subjurisdiction has adopted the FPERA. The court below determined that because Harris County had not adopted the FPERA, it could not enter into *any* type of agreement with an employee representative. The court dismissed the fact that Texas does recognize informal employee representative for the purposes of presenting employment grievances. Moreover, the Fifth Circuit contended, in light of Harris County's inability, under state law, to enter into an agreement with the deputies' representative, Harris County was free to implement any compensatory policy which had existed prior to April 15, 1986 or to which individual employees had agreed.

However, the statutory language itself asserts that the provision is satisfied through a "memorandum of understanding or any other agreement." Section 207(o) also begins by declaring that compensation time can *only* be provided if there is an agreement with the representative

or, if there is no representative, an agreement with the individual employee. Furthermore, the Department of Labor has promulgated regulations which provide that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." The Fifth Circuit wholly ignored both the statutory and regulatory language. Given the statutory language and the Labor Department's regulations, the Fifth Circuit's insistence that Section 207(o)(2)(A)(i) has no application where the state does not permit collective bargaining is simply incorrect.

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MICHAEL T. LEIBIG
(Counsel of Record)
INTERNATIONAL UNION OF
POLICE ASSOCIATIONS,
AFL-CIO, General Counsel
ZWERDLING, PAUL, LEIBIG, KAHN,
THOMPSON & DRIESEN, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000
Counsel for Lynwood Moreau and all other Petitioners [8]

[8] Carla Markim, a third year law student, participated in the preparation of this petition for *certiorari*.

92-1

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. LEIBIG
(Counsel of Record)
INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, General Counsel
ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & DRIESEN, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000
Counsel for Lynwood Moreau and all other Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-2833

LYNWOOD MOREAU, Individually, as President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO, and as FLSA Representative of 37 Similarly Situated consenting Harris County Law Enforcement Officers, *et al.*,

Plaintiffs-Appellants,

v.

JOHNNY KLEVENHAGEN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

March 31, 1992

Before WILLIAMS, WIENER, Circuit Judges, and LITTLE, District Judge*.

WIENER, Circuit Judge:

A deputy sheriffs' union appeals the district court's grant of summary judgment in favor of Harris County, Texas on all three of the union's claims under the Fair Labor Standards Act (FLSA). We affirm the grant of summary judgment on two of those claims. But finding that the union was misled by the district court's bifurcation of the case and was thereby prevented from present-

---

* District Judge of the Western District of Louisiana, sitting by designation.

ing adequate summary judgment proof on the third claim, we reverse and remand to the district court for further proceedings with respect to that claim.

I.

FACTS

On April 15, 1988, Eugene T. Merritt, Jr. brought suit individually and as President of the Harris County Deputy Sheriffs Union[1] (the Union), together with approximately 400 other Harris County Deputy Sheriffs, against Harris County and Sheriff Johnny Klevenhagen (collectively, the "County"). The complaint alleged that the County violated the FLSA by (1) failing to pay cash in lieu of compensatory time for overtime work in the absence of an agreement with the plaintiffs' designated representative (the comp time claim); (2) failing to include longevity pay in the plaintiffs' "regular rate of pay" for overtime payment calculations (the longevity claim); and (3) excluding non-mandated firearms qualification time from the calculation of number of hours worked (the firearms qualification claim). The district court denied the Union's motion for partial summary judgment and granted summary judgment in favor of the County on all three claims.

II.

ANALYSIS

A. *The Comp Time Claim.*

Under the Harris County pay system, deputy sheriff's receive compensatory time as overtime compensation at 1½ times the normal rate of pay. When a deputy's bank of comp time reaches 240 hours, the deputy receives compensation in cash for overtime at the hourly rate, based

[1] At the time of appeal, Lynwood Moreau served as president of the Union.

on the deputy's "base pay rate." Each of the deputies in this action designated the Union as his or her representative. The County instituted its pay system without an agreement with the Union.

The Union's claim alleges that the County's pay system violates Section 7(*o*) of FLSA, which provides in part:

> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) Pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of such employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of work . . . .
>
> • • • •
>
> (B)
>
> • • • •
>
> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii).[2]

The County's current pay system was the "regular practice in effect" on April 15, 1986. Each deputy signed a payroll compensation form that stated that the deputy understood and accepted the County's personnel regulations, which set forth the terms of the pay system.

[2] 29 U.S.C. § 207(*o*).

The Union asserts that as the deputies in this case have designated the Union as their representative, under Section 207(*o*)(2)(A)(i) the County has no authority to pay deputies for overtime in comp time, even if the deputies elect to be paid in comp time, unless the County has entered into an agreement with the Union to that effect. The Union relies on the Tenth Circuit's decision in *International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*[3] In that case, the Tenth Circuit analyzed the Department of Labor regulations interpreting Section 207(*o*) and held that "(1) if employees have a representative, an employer may pay comp time in lieu of cash only pursuant to an agreement between the employer and the representative, and (2) employees are deemed to have a representative by merely designating a representative, whether or not the employer recognizes the representative. The Union argues that under *West Adams*, as the deputies had designated the Union as their representative, the County could not pay comp time in the absence of an agreement with the Union.

We find the Union's argument unpersuasive. TEX. REV.CIV.STAT.ANN. art. 5154c prohibits any political subdivision from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act. Harris County has not adopted that Act; thus, under article 5154c the County has no authority to bargain with the Union. In light of that Texas statute, it is not *West Adams* but two other circuit court decisions, one from the Fourth Circuit[4] and another from the Eleventh Circuit,[5] that are instructional in the disposition of this case.

---

[3] 877 F.2d 814 (10th Cir.1989).

[4] *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir.1989), *cert. denied*, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990).

[5] *Dillard v. Harris*, 885 F.2d 1549 (11th Cir.1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990).

In *Abbott v. City of Virginia Beach*,[6] the Fourth Circuit held that neither FLSA nor the regulations implementing it showed any intent to preempt state laws prohibiting cities from entering into collective bargaining agreements.[7] As Virginia law had such a prohibition, and as the pay system in Virginia Beach gave individual police officers an absolute choice of receiving either comp time or cash for overtime work, the Fourth Circuit held that the pay system, which was not the result of an agreement between the city and the officers' designated representative, did not violate FLSA.[8]

In *Dillard v. Harris*,[9] the Eleventh Circuit agreed with the analysis in *Abbott* and went on to discuss an alternative approach that led to the same result. In *Dillard*, as in *Abbott* and the instant case, (1) the employees had designated a representative, (2) state law prohibited the city from entering into a collective bargaining agreement, and (3) the city, without an agreement with the employees' representative, had established a pay system providing for comp time. The city employees argued that, as they had designated a representative, the city could not pay them in comp time in the absence of an agreement with their representative. The *Dillard* court held that under the plain language of Section 207(*o*)(2)(A), the prerequisite for coverage under subclause (i) was the existence of an *agreement* between the city and the representative, rather than the existence of the *representative*.[10] Thus, held the court, even though the employees had designated a representative, subclause (ii) rather than subclause (i) applied because there was no agreement between the city and the representative under sub-

---

[6] Note 4, *supra*.

[7] *Id.* at 136.

[8] *Id.* at 137.

[9] Note 5, *supra*.

[10] *Id.* at 1552-54.

clause (i).[11] The court held that as the employees were hired before April 15, 1986, and as the city's practice before that date was to give comp time in lieu of cash, that practice constituted an agreement under subclause (ii), and was permissible under Section 207(o)(2)(B).[12]

Joining our colleagues of the Fourth and Eleventh Circuits, we hold that, because Texas law prohibits the County from entering into a collective bargaining agreement with the Union—and thus there is no such agreement—the deputies are not covered by subclause (i) of Section 207(o)(2)(A). Rather, subclause (ii) of that section applies. Under Section 207(o)(2)(B), the County's pay system, which was in effect on April 15, 1986, constituted an agreement between the County and deputies hired prior to that date. For deputies hired after April 15, 1986, the individual compensation form signed by each deputy constituted individual agreements of the type contemplated by Section 207(o)(2)(A)(ii). Thus, the County has complied with Section 207(o) and the payment of comp time in lieu of cash is proper.

Nevertheless, the Union argues that, even in light of the Texas law that prohibits political subdivisions from entering into collective bargaining agreements, the County was still required to enter into an agreement with the Union before it could pay deputies in comp time. The Union contends that under Section 207(o) comp time may be authorized pursuant to agreements that are not classified as collective bargaining agreements, thus not violating Texas law. Section 207(o)(2)(A)(i) provides that a public agency may provide comp time pursuant to:

> [A]pplicable provisions of a collective bargaining agreement, *memorandum of understanding, or any other agreement between the public agency and representatives of such employees* (emphasis added).

[11] *Id.* at 1552-53.

[12] *Id.* at 1553.

The Union asserts that it represents the deputies in a non-collective bargaining capacity and that any agreement between the Union and the County would be classified as "any other agreement" under Section 207(o), not in violation of Texas law. The Union also cites TEX.REV. CIV.STAT.ANN., art 5154c Section 6, which recognizes the right of public employees to present grievances through a "representative" such as the Union, and argues that under that statute, the Union is allowed to deal with the County in a non-collective bargaining capacity.

We reject this argument. Presentation of grievances is acceptable under Texas law because it is a unilateral procedure under which the employee can be represented by anyone he or she chooses, be it a lawyer, clergyman, union or some other person or organization. Texas law prohibits any bilateral agreement between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the County could not enter into *any* agreement with the Union.

B. *The Longevity Claim.*

The County pays its deputy sheriffs "longevity pay" each year. Those payments are calculated by multiplying a fixed dollar amount, which the County Commissioners Court determines annually, by the number of years an individual employee has been employed by the County. That total is paid to the employee in monthly installments throughout the year.

The "regular rate of pay" is the rate which is multiplied by one and one-half to arrive at the rate of overtime pay pursuant to Section 7(a) of FLSA.[13] The County does not include longevity pay in its determination of the "regular rate of pay" for purposes of calculating the rate of overtime pay. The Union contends that

[13] 29 U.S.C. § 207(a).

this violates FLSA. Section 7(e) of FLSA provides in part:

> (e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> > (1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a *reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency* (emphasis added).[14]

The regulation interpreting Section 207(e) provides that if a payment "is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift."[15] The district court concluded that the longevity payments were not geared to wages, efficiency or production and held that they were a "reward for service." Thus, held the court, the payments qualified as "sums paid as gifts" under Section 207(e)(1) and were properly excluded from the determination of "regular rate of pay."

The Union cites three administrative letter rulings by the Department of Labor for its argument that longevity payments must be included in "regular rate of pay" for purposes of calculating overtime pay. Those letters are easily distinguishable, however. One letter concerns incentive payments made to employees following the completion of educational or career development programs and is clearly not applicable to the instant case. The other two letters state that longevity payments made

[14] 29 U.S.C. § 207(e).

[15] 29 C.F.R. § 778.212 (1989).

pursuant to a city ordinance or a collective bargaining agreement between the employer and employees must be included in "regular rate of pay." In the instant case, no such ordinance or bargaining agreement binds the County to make longevity payments.

The deputies receive the longevity payments regardless of the number of hours worked or wages earned. The payments serve no purpose other than to reward the deputies for their tenure as County employees. The Union cites no authority in support of its argument other than the administrative letter rulings which we have distinguished. As the payments are not measured by or dependent on hours worked, production or efficiency, we hold that the longevity payments qualify as "sums paid as gifts." As such, the County properly excludes the longevity payments from "regular rate of pay."

C. *The Firearms Qualification Claim.*

The Union's complaint alleged that the County wrongfully excluded certain time spent in firearms qualification from the calculation of the number of hours worked by the deputy sheriffs—thereby depriving deputies of compensation for that time. Texas law requires law enforcement officers to meet firearms proficiency qualifications once each year. The Union and the County agree that *training* time spent to meet that qualification, as well as time spent training for requalification—as distinguished from time spent in a second actual qualification—is not compensable under FLSA, even if such time exceeds a deputy's normal working hours. From 1986 until August 1991, however, the County required its law enforcement officers to meet the proficiency qualifications twice each year.[16] The Union argues that, as the second qualification requirement each year exceeded the state requirement of one qualification per year, any overtime spent by the dputies in qualifying a second time during each of those years was compensable.

[16] The County now requires its officers to qualify only once each year.

Job-related training activities are generally compensable under FLSA,[17] but the FLSA regulations provide that required training is not compensable in the following situations:

> (1) Attendance outside of regular working hours at specialized or follow-up training, which is *required by law* for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.
>
> (2) Attendance outside of regular working hours at specialized or follow-up training, which is *required* for certification of employees of a governmental jurisdiction *by law of a higher level of government (e.g., where a State or county law* imposes a training obligation on city employees), does not constitute compensable hours of work.[18]

The Union argues that, although overtime related to the first qualification during a year is excluded from compensability pursuant to the regulations, as the second qualification during a year is required by county policy only—not by state or county law—any overtime spent meeting the second qualification requirement is not an exception to the general rule of compensability.

Central to our determination here is the fact that the district court bifurcated this case into two stages—the first stage was supposed to address only liability and the second stage was supposed to address damages. The Union argues that, despite the bifurcation, the district court's holding in fact addressed the issue of damages during the first, or liability stage, at a time when the parties had not yet conducted discovery. The Union asserts that the sole purpose of the liability stage of the proceedings was to determine whether in fact the County maintained a policy of not compensating deputies for any overtime spent training to meet either of the semi-annual qualification requirements and, if so, whether implementation of that policy would violate the overtime provision of FLSA. Thus, the Union contends, it should not have been required in the liability stage to produce proof that any deputies had actually trained twice without being compensated for overtime on either occasion, and the district court erred in ruling on the damages stage before the Union had an opportunity to present summary judgment proof on that issue. The Union urges that, inasmuch as the twice-a-year qualification policy, if applied, would entitle deputies to overtime, we should remand this case to the district court with instructions to allow the Union to adduce its evidence of actual damages suffered, on a deputy by deputy basis, whether by summary judgment proof, in an evidentiary hearing, or in a full-blown trial. We agree.

[17] 29 C.F.R. 785.27 (1989).

[18] 29 C.F.R. 553.226(b) (1989) (emphasis added).

In our *de novo* review of this case, we hold that the district court erred in two respects. First, the district court erred in its determination of the factual circumstances under which a deputy would be entitled to overtime compensation. The district court stated that if a deputy met the State-required annual qualification but failed to meet the County's semi-annual qualification requirements within the same year, and as a result that deputy was required to participate in remedial training which caused him to work more than forty hours during a week, the deputy would be entitled to overtime compensation. The district court held that the Union's claim did not survive the County's motion for summary judgment, however, because the Union had failed to demonstrate by summary judgment proof that one or more of the deputies had not in fact been compensated in such a situation.

In the situation discussed by the district court, an officer who twice tries but fails even once to meet the certification requirements must make additional attempts until he or she succeeds. But the Union concedes that time spent by an officer in training for such "make-up" qualification tests is not compensable overtime under FLSA because the County allows participation in such remedial activities to take place during normal working hours. The situation actually being contested, though, is different. It questions overtime entitlement of a deputy who *passes* his shooting test twice a year on his own time without being paid overtime for either event. Thus, contrary to the district court's conclusion, deputies are claiming entitlement to overtime compensation *only* if they spend time in excess of normal working hours to meet the requirements for the second shooting qualification during a year after having already worked on their own time to meet the requirement once that year.

The district court's second error was in granting summary judgment in favor of the County on the firearms qualification issue. A memorandum dated February 16, 1987 from Sheriff Klevenhagen to all Sheriff's Office personnel provided:

> Firearms requalification for peace officers is required by the State of Texas as a condition of maintaining the Peace Officer License. A thorough search of applicable law by the office of the County Attorney has determined that under this condition the time spent in demonstrating firearms proficiency is not compensable time when occurring outside normal duty hours. *Therefore, effective immediately, no overtime compensation will be granted for time spent on firearms requalification* (emphasis added).

That summary judgment proof clearly showed that the County did in fact have a policy under which deputies would receive no compensation for any overtime spent meeting either of the semi-annual qualification requirements. Whether any deputies were actually deprived of overtime compensation because of the County's firearm qualification policy should have been addressed only at the damages stage of the proceedings. Thus, the district court "jumped the gun" when it granted summary judgment in favor of the County before the Union had an opportunity to conduct discovery and present proof of damages.

We therefore reverse the district court's grant of summary judgment on this issue and remand for further proceedings. As we have concluded that the County had a policy which potentially could deprive deputies of their just compensation, the Union must be allowed to discover and present proof, if there be any, of which deputies suffered damages as a result of that policy, and to what extent. To establish that its members actually incurred damages, the Union must show that one or more deputies (1) trained on their own time to meet *both* semi-annual qualification requirements during a year, and (2) received no overtime compensation for either occasion. Obviously, each deputy will be limited to recovery of overtime for only one such qualification per year because the other is required by state law and therefore is not compensable.

III.

CONCLUSION

As Texas law prohibits the County from entering into an agreement with the Union, the County's pay system constitutes an agreement between the County and the individual deputies in compliance with Section 7(*o*) of FLSA. Therefore, the district court did not err in granting summary judgment in favor of the County on the Union's comp time claim. Neither did the district court err in granting summary judgment in favor of the County on the Union's longevity payments claim because the payments were not measured by or dependent on hours

worked, production or efficiency but qualified as gifts. The district court did err, however, in granting summary judgment in favor of the County on the Union's firearms qualification claim. We therefore REVERSE the district court's grant of summary judgment in favor of the County on that claim and REMAND to the district court for the sole purpose of determining whether any deputies suffered damages and, if so, to what extent. In all other respects, we AFFIRM the judgment of the district court.

APPENDIX B

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CA-H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

vs.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

MEMORANDUM AND ORDER

[Entered Sep. 5, 1990]

Pending before the Court is Plaintiffs' motion for partial summary judgment on the issues of Defendants' use of compensatory time in lieu of cash payment for overtime, the exclusion of longevity pay from calculation of employees' "base pay", and Defendants' refusal to include certain training time as hours worked. Also pending is Defendants' motion for summary judgment.

Plaintiffs' contend that Defendants are violating section 207(o) of the Fair Labor Standards Act (FLSA) by awarding employees compensatory time off rather than cash payment for overtime. 29 U.S.C. § 207(o). Plaintiffs' second claim is that the calculation of their "base pay" rate illegally excludes the employees longevity pay. The "base pay" calculation is used to determine the overtime compensation due to employees. Thirdly, Plaintiffs claim that Defendants wrongfully exclude certain firearms training from the calculation of hours worked.

SUMMARY JUDGMENT

Summary judgment is authorized if the movant establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 mandates entry of summary judgment against a party who, after adequate discovery, fails to establish the existence of every element of his case for which he has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To avoid suffering a summary judgment, the nonmoving party must raise a fact issue by depositions, answers to interrogatories, affidavits or judicial admissions. *Id.*

USE OF COMPENSATORY TIME

Plaintiffs Harris County Deputy Sheriff's Union, Local 154, AFL-CIO (Local 154) and individual deputies sheriff (individual plaintiffs) contend that the Defendants Sheriff Johnny Klevenhagen and Harris County are violating the compensatory time provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(o). The relevant portion of the statute provides as follows:

> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).
>
> In the case of employees described in clause A(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause A(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

Id.

It is undisputed that Defendants had a "regular practice in effect on April 15, 1986" that provided that overtime be compensated through compensatory time off. For employees hired after April 15, 1986, the Harris County Personnel Regulations and the individual employee compensation form (which incorporate by reference the Personnel Regulations) signed by the individual Plaintiffs, constitute an agreement between employer and employee of the type contemplated by section 207(o)(2)(A)(ii).

The principal area of disagreement in this case is whether subclause (i) or subclause (ii) is applicable. That answer turns on the meaning attached to the phrase "not covered by subclause (i)" found in subclause (ii). Plaintiffs contend that the phrase means subclause (ii) applies only to employees who have no representative. Defendants' contend that the phrase means subclause (ii) applies whenever no agreement exists irrespective of the existence of an employees' representative.

This issue has been addressed in three Courts of Appeals decisions. Plaintiffs rely on *Local 2203 v. West Adams County Fire Protection District*, which held that "The employees' designation, rather than the employer's

recognition, of a representative is the event which triggers the application of section 207(o)(2)(A)(i), thereby precluding the use of . . . a regular practice." *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814, 820 (10th Cir. 1989). In *West Adams*, the court found the controlling language of the statute was ambiguous and resorted to the legislative history of the FLSA and 29 C.F.R. 553.23 to resolve the ambiguity. Plaintiffs urge the Court to follow the *West Adams* rationale which requires, upon employee designation of a representative, that the employers either come to an agreement with the employees' representatives or pay cash remuneration for overtime.

Defendants assert that state law prohibits their bargaining with employees' representatives in the area of compensation. Absent the adoption of the Fire and Police Employee Relations Act by the voters of the political subdivision involved, Texas statutes prohibit public employers from collective bargaining with any labor organization. Tex. Rev. Civ. Stat. Ann. art. 5154c and 5154c-1 (Vernon 1987). Counties and deputies sheriff are included in and covered by these articles. *Commissioners' Court of El Paso County v. El Paso County Sheriff's Deputies Ass'n.*, 620 S.W.2d 900 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.). The term "collective bargaining" as applied by the National Labor Relations Act means ". . . [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . .". 29 U.S.C.A. § 158(d). *See* also *N.L.R.B. v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir 1941). Plaintiff Local 154's attempt to reach an agreement with Defendants was an attempt at collective bargaining and is prohibited by Texas Law.

In *Abbott v. City of Virginia Beach*, the Fourth Circuit Court of Appeals considered the application of sec-

tion 207(o) where state law prohibited collective bargaining between policemen's representatives and the city. *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989). The court quoted 29 C.F.R. 553.23(b)(1) which declares the representative of a employee is deemed to have been effectively appointed if he had been designated by the employee, irrespective of his being recognized by the employer. The court then addressed the application of state law. The court first noted that several commentators had expressed concern that section 553.23(b)(1) would conflict with state law and then quoted the Secretary of Labor as follows:

> . . . Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.

Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed.Reg. 2012, 2014-15 (1987).

The court concluded that section 207(o) allows ". . . public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." *Abbott*, 879 F.2d at 135.

Texas statutes forbid the collective bargaining attempted by Local 154. Art. 5154c. Where state law prohibits an employer from entering into a collective bargaining agreement, section 207(o) allows individual compensation agreements. *Abbott*, 879 F.2d 132. Defendants had a regular practice in effect on April 15, 1986 with respect to compensatory time off which constitutes, via

section 207(o)(2)(A)(ii), an agreement with employees hired prior to April 15, 1986. Employees hired after April 15, 1986 are parties to individual agreements. Consequently, the Defendants are in compliance with FLSA section 207(o).

The Eleventh Circuit Court of Appeals has also addressed this issue. In *Dillard v. Harris*, the court adopted the *Abbott* rationale and decision thereby rejecting the *West Adams* opinion of the Tenth Circuit Court of Appeals. *Dillard v. Haris*, 885 F.2d 1549 (11th Cir. 1989). *Abbott*, 879 F.2d 132, *West Adams*, 877 F.2d 814. In *Dillard*, the plaintiff took the position that they had a representative and since no agreement between the representative and the employer existed, the law required cash payment for overtime. The employer's position was that the law prohibited an agreement, and the lack of an agreement triggered the alternative clause wherein employer-employee individual agreements controlled the choice of remuneration. The court proffered an alternative analysis to the *Abbott* decision based on the contention that the statute was not ambiguous, and that absent a contrary mandate within the legislative history, no other interpretation would be allowed. The court then discussed whether a representative pursuant to section 207(o)(2)(A)(i) must be "merely designated" or recognized. In reviewing the legislative history, the court found a discrepancy between the House of Representatives and the Senate versions of the bill. The House version supported the "merely designated" interpretation and the Senate version supported the "recognized" representative requirement. After noting that controlling weight should be given to the intent of the originating legislative body and that the bill originated in the Senate, the court adopted the "recognized" representative requirement position. The court then stated that even if controlling weight were placed on the existence of a representative rather than the existence of an agreement, subclause (ii) would still attach because the state law prohibited the representative from being "recognized". *Dillard*, 885 F.2d at 1554.

Even if Plaintiffs' attempt to distinguish (by contending that Texas Law does not conclusively prohibit collective bargaining) the case at bar from *Abbott* were successful, Local 154 could not be a "recognized" representative because the voter adoption requirements of article 5154c-1 have not been met. Therefore, subclause (ii) would control and the "regular practice" provision as individual agreement would allow compensatory time in lieu of cash payment for overtime for employees hired prior to April 15, 1986. The individual agreements would do the same for later employees. Under either analysis, the Defendants are in compliance with FLSA section 207(o).

CALCULATION OF COMPENSATION

Harris County deputies sheriff receive cash overtime compensation at one and one-half times the individual's regular pay rate after the individual has accumulated 240 hours of compensatory time. Individual Plaintiffs receive additional longevity pay based on their years of service. That pay rate was $60.00, $70.00, and $75.00 per year of service for the years 1985, 1986 and 1987 respectively. This longevity pay is not dependent on the individual's hourly or monthly pay rate. Plaintiffs contend that this pay must be included in the regular pay rate for calculation of overtime compensation.

Plaintiffs rely on two opinion letters from the Department of Labor (DOL). The Supreme Court has evaluated the significance of such administrative rulings as follows:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a

> judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

With reference to these kinds of administrative rulings, the Fifth Circuit Court of Appeals has stated, "The force with which these least authoritative pronouncements are allowed to press on the Judicial scales, however, must vary with the circumstances of each case. *Pollock v. General Finance Corp.*, 552 F.2d 1142, 1144 (5th Cir. 1977).

The first DOL letter (Document 12, attachment 3) is inapposite because it advises that certain incentive pay that follows from completion of educational/career development programs must be included in overtime compensation calculation. The case at bar is distinguishable because longevity pay requires no performance from an employee above continued employment. The second letter (Document 23, attachment 3) applies to a situation which is also distinguishable from this case. The second letter advised that lump sum longevity pay for employees completing eight (8) years of service, paid pursuant to a contract or city ordinance, was to be included in overtime pay calculation. No such ordinance or contract is in evidence or alleged in this case. Furthermore, the opinion letter states that the expressed opinion is made "On the basis of the information available to us. . . ." This "information" is not revealed in the letter. The letter implies that the "information" was significant and the Court would be reluctant to attach precedential value without a clearer understanding of the factual situation surrounding the letter opinion. For these reasons, the Court finds the opinion letters to be of little significance to this case.

The FLSA states that the regular rate:

> . . . [S]hall not be deemed to include gifts; payments in the nature of gifts made at Christmas time or on other special occasions, *as a reward for service*, the amounts or which are not measured by or dependent on hours worked, production or efficiency;

29 U.S.C. § 207(d)(1) (emphasis added).

In interpreting this provision of the FLSA, the regulations state

> (b) . . . If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift . . .
>
> . . .
>
> (c) . . . A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

29 C.F.R. § 778.212 (1989).

The longevity pay is an award for service and is not geared to wages, efficiency or production. The Court finds that the longevity pay is properly excluded from the overtime compensation calculation.

COMPENSATION FOR TRAINING TIME

Plaintiffs allege that Defendants wrongfully exclude "certain firearms training time from calculation of hours worked. (Document 1, paragraph 22). Defendants admit that they exclude from hours worked the time spent in firearms requalification and further assert that remedial firearms training is "in lieu of [an officer's] regular work assignment" for which attendants are paid straight time.

The State requires firearms proficiency qualifications annually. Both parties agree that training time spent to

meet this qualification is not compensable. Defendants, however, require firearms qualification *semi*annually. FLSA regulations generally require that job related training activities that are on premises during regular hours are compensable. 29 C.F.R. 785.27 (1989). The regulations permit exceptions for certain governmental employees such as deputies sheriff including: (1) attendance outside of regular working hours for specialized or follow-up training, and (2) attendance outside regular working hours for training required by a higher level of government.

It is possible that an individual Plaintiff may have successfully met his State required firearms qualification for the year and subsequently failed to meet the Defendants' *semi*annual requirements within the same calendar year. If that individual were then required to participate in remedial training, on premises, and during regular work hours during a workweek in which his worked time, including the time spent in remedial training, exceeded forty (40) hours, then he would be entitled to overtime compensation. However, to survive a motion for summary judgment, Plaintiffs must demonstrate by deposition, answers to interrogatories, admissions or affidavits that this specific fact has occurred. *Celotex*, 477 U.S. 317. Plaintiffs have failed to meet this burden.

Accordingly, the court

ORDERS that the Plaintiffs motion for partial summary judgment is DENIED and

ORDERS that the Defendants motion for summary judgment is GRANTED.

Signed in Houston, this 29th day of August, 1990.

/s/ James DeAnda
JAMES DEANDA
Chief Judge
Southern District of Texas

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

FINAL JUDGMENT

[Entered Sep. 5, 1990]

In accordance with the memorandum opinion signed this day in the above-referenced proceeding, it is hereby

ORDERED

that Plaintiff's motion for partial summary judgment is DENIED and defendants motion for summary judgment is GRANTED and, accordingly, judgment is entered for defendants and all costs herein incurred are taxed to plaintiffs.

Signed this 29th day of August, 1990.

/s/ James DeAnda
JAMES DEANDA
Chief Judge
Southern District of Texas

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2833

D.C. Docket No. CA H 88 1298

LYNWOOD MOREAU, Individually as President of the Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, and as FLSA REPRESENTATIVE OF 37 Consenting Similarily Situated Consenting Harris County Law Enforcement Officers, *et al.*,
Plaintiffs-Appellants,

versus

JOHNNY KLEVENHAGEN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before WILLIAMS, WIENER, Circuit Judges, and LITTLE [1], District Judge.

JUDGMENT

[Filed Mar. 31, 1992]

---

[1] District Judge of the Southern District of Texas, sitting by.

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court's grant of summary judgment in favor of the County on the Union's firearms qualification claim is reversed and remanded to the District Court for the sole purpose of determining whether any deputies suffered damages and, if so, to what extent; in all other respects, the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

March 31, 1992

Issued as Mandate: May 12, 1992

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 207(o)(1)-(2)

§ 207. Maximum hours.

* * *

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in

lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

29 C.F.R. § 553.23

§ 553.23 Agreement of understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7 (o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must, be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation

may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (e)(1) of this section.

52 Fed. Reg. 2014-15 (January 16, 1987)

Section 7(o) Compensatory Time and Compensatory Time Off.

• • • •

Section 553.23 Agreement or understanding prior to performance of work.

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

• • • •

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23 (b)(i), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law.

They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no auhtority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggest that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer

and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA Section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

• • • •

APPENDIX F

99th Congress
1st Session

Report
99-331

HOUSE OF REPRESENTATIVES

FAIR LABOR STANDARDS AMENDMENTS OF 1985

October 24, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H.R. 3530]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3530) to amend the Fair Labor Standards Act of 1938 to authorize the provision of compensatory time in lieu of overtime compensation for employees of States, political subdivisions of States, and interstate governmental agencies, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, report favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE; REFERENCE TO ACT

SECTION 1. (a) SHORT TITLE.—This Act may be cited as the "Fair Labor Standards Amendments of 1985".

(b) REFERENCE TO ACT.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be a reference to a section or other provision of the Fair Labor Standards Act of 1938.

COMPENSATORY TIME

SEC. 2. (a) COMPENSATORY TIME.—Section 7 (29 U.S.C. 207) is amended by adding at the end the following:

"(o) (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(2) A public agency may provide compensatory time under paragraph (1) only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding

arrived at between the employer and employee before the performance of the work; and

"(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(iii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

"(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 180 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 180 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

"(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

"(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused

compensatory time at a rate not less than the average regular rate received by such employee during the last 3 years of the employee's employment.

"(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

"(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

"(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

"(6) For purposes of this subsection—

"(A) the term 'overtime compensation' means the compensation required by subsection (a), and

"(B) the term 'compensatory time' and 'compensatory time off mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.".

(b) EXISTING COLLECTIVE BARGAINING AGREEMENTS.—A collective bargaining agreement which is in effect on April 15, 1936, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)).

(c) LIABILITY AND DEFERRED PAYMENT.—(1) No State, political subdivision of a State, or interstate gov-

ernment agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 7 or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

(2) A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 4, 1986.

SPECIAL DETAILS, OCCASIONAL OR SPORADIC EMPLOYMENT, AND SUBSTITUTION

SEC. 3. (a) SPECIAL DETAIL WORK FOR FIRE PROTECTION AND LAW ENFORCEMENT EMPLOYEES.—Section 7 (29 U.S.C. 207) is amended by adding after subsection (o) (added by section 2) the following:

"(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

"(A) requires that its employees engaged in fire protection, law enforcement, or security activities be

hired by a separate and independent employer to perform the special detail,

"(B) facilitates the employment of such employees by a separate and independent employer, or

"(C) otherwise affects the condition of employment of such employees by a separate and independent employer.".

(b) OCCASIONAL OR SPORADIC EMPLOYMENT.—Section 7(p) (29 U.S.C. 207), as added by subsection (a), is amended by adding at the end the following:

"(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.".

(c) SUBSTITUTION.—(1) Section 7(p) (29 U.S.C. 207), as amended by subsection (b), is amended by adding at the end the following:

"(3) If an individual who—

"(A) is employed by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, and

"(B) is employed in fire protection or law enforcement activities (including activities of security personnel in correctional institutions),

agrees, with the approval of the public agency and solely at the option of such individual, to substitute during

scheduled work hours for another individual who is employed by such agency in such activities, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section."

(2) Section 11(c) (29 U.S.C. 21(c)) is amended by adding at the end the following: "The employer of an employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.".

VOLUNTEERS

SEC. 4. (a) DEFINITION.—Section 3(e) (29 U.S.C. 203(e)) is amended—

(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and inserting in lieu thereof "paragraphs (2), (3), and (4)", and

(2) by adding at the end the following:

"(4)(A) The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

"(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunterred; and

"(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

"(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.".

(b) REGULATIONS.—Not later than March 15, 1986, the Secretary of Labor shall issue regulations to carry out paragraph (4) of section 3(e) (as amended by subsection (a) of this section).

(c) CURRENT PRACTICE.—If, before April 15, 1986, the practice of a public agency was to treat certain individuals as volunteers, such individuals shall until April 15, 1986, be considered, for purposes of the Fair Labor Standards Act of 1938, as volunteers and not as employees. No public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall be liable for a violation of section 6 occurring before April 15, 1986, with respect to services deemed by that agency to have been performed for it by an individual on a voluntary basis.

STATE AND LOCAL LEGISLATIVE EMPLOYEES

SEC. 5. Clause (ii) of section 3(e)(2)(C) (29 U.S.C. 203(e)(2)(C)) is amended—

(1) by striking out "or" at the end of subclause (III),

(2) by striking out "who" in subclause (IV),

(3) by striking out the period at the end of subclause (IV) and inserting in lieu thereof ", or", and

(4) by adding after subclause (IV) the following:

"(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.".

EFFECTIVE DATE

SEC. 6. The amendments made by this Act shall take effect April 15, 1966. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

EFFECT OF AMENDMENTS

SEC. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7, or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

DISCRIMINATION

SEC. 8. A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act.

I. INTRODUCTORY STATEMENT

The Fair Labor Standards Act of 1938 was enacted on June 25, 1938. The basic policy of the Act is contained in its second section:

> SEC. 2.(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> (b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

II. HISTORY OF THE ACT

On June 25, 1938, one of the nation's basic labor laws was enacted—the Fair Labor Standards Act of 1938. The first statutory minimum wage was established at 25 cents an hour for the year beginning October 24, 1938. The Act applied to all employees, not specifically exempted, who were engaged in commerce or in the production of goods for commerce.

The original Act provided that the statutory minimum wage would be raised to 30 cents an hour beginning October 24, 1939. A procedure was established for raising the minimum wage by stages to a level of 40 cents an hour, industry by industry, as rapidly as possible; but, in any case, 40 cents an hour was to become the national minimum wage within 7 years after the effective date of the Act; that is, by October 24, 1945.

During the interval, intermediate minimum wages were applied to different industries on recommendation

of industry committees. The last order of the Wage and Hour Administrator raising the minimum wage to 40 cents an hour was issued in July 1944, the year before the date set by the Act of the 40 cents an hour minimum wage rate to become applicable.

The Act also established an overtime rate (not less than 1½ times the employee's regular hourly rate) which was to be paid employees for employment in excess of certain maximum hours in a workweek. Thus, during the first year of the Act, that is, from October 24, 1938, to October 23, 1939, a maximum hours standard of 44 hours a week was applied to covered employees; during the second year, 42 hours became the standard; and after 2 years, the standard was reduced to 40 hours a week. The time-and-one-half penalty overtime rate has never been altered, although amendments were passed in subsequent years increasing the statutory minimum wage and extending coverage to unprotected workers.

After increases in the minimum wage in 1949 and 1955, Congress in 1961 increased the minimum wage rate and expanded the coverage of the Act. The 1961 amendments significantly enlarged the scope of the Act through the addition of another basis of coverage—employment in an "enterprise engaged in commerce or in the production of goods for commerce." Each and every employee of such an enterprise, unless specifically exempted, received the minimum wage and overtime protections of the Act.

Under the Fair Labor Standards Amendments of 1966 (80 Stat. 830) the definition of "enterprise" coverage was extended to enterprises engaged in the following: a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution; a school for the mentally or physically handicapped or gifted children; an elementary or secondary school, or an institution of higher education. The 1966 amendments provided coverage for

both public and private hospitals or institutions. The amendments also extended coverage to both public and private street, suburban or inter-urban electric railways; local trolleys; and motorbus carriers which were subject to state or local regulation. The definition of the term "employer" was amended to remove the exemption for states and their political subdivisions regarding employees of hospitals, institutions, and schools, and for employees of public railways and carriers.

In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Supreme Court upheld the constitutionality of the inclusion of state-operated hospitals and schools under the "enterprise concept" of coverage. The inclusion of state institutions under the Fair Labor Standards Act by Congress did not exceed Congress' power under the Commerce Clause, according to the Court.

In 1974 Congress expanded the Fair Labor Standards Act to cover all state and local government employees, except for a small number exempted, and to a significant number of domestic workers in the Fair Labor Standards Amendments of 1974 (88 Stat. 55). The 1974 amendments also extended Fair Labor Standards Act coverage to a wide range of federal employees, including civilian employees of the military departments, employees of agencies of the executive branch, and employees of the U.S. Postal Service. These employees received the minimum wage and overtime protections of the Act.

The 1974 amendments included a limited overtime exception for police officers, fire fighters, and related employees. (29 U.S.C. 207(k)). Congress established these special provisions in recognition of the special needs of governments and the unusually long hours that these public safety employees must spend on duty, ready and available to respond to calls to protect the public safety. Section 7(k) was intended to alleviate the impact of the Fair Labor Standards Act on the fire protection and law enforcement activities of state and local government by

providing for work periods of up to 28 days (instead of the usual seven-day workweek), establishing somewhat higher ceilings on the maximum number of hours which could be worked before overtime compensation had to be paid, and providing for a gradual phase-in period beginning in January 1, 1975. By the end of the phase-in period, effective January 1, 1978, the maximum number of hours for police officers and fire fighters was to be the lesser of 216 or the average hours of work in work periods of 28 days as determined in statutorily mandated studies. The Secretary of Labor was required to conduct these studies which were intended to ascertain the average number of regularly scheduled hours of work of these employees in order to determine the appropriate hourly level at which the overtime standard should be set. In 1983, the Department of Labor published in the Federal Register the results of its studies establishing the hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 Fed. Reg. 40,518). Thus, from the time employers properly elect to cover their fire fighters, police and related employees under the exception of Section 7(k), they need only pay overtime compensation for the hours in the employees' tours of duty that exceeded the levels applicable under that provision.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court overruled *Wirtz* and held that both the 1966 and the 1974 amendments were unconstitutional to the extent that they interfered with the integral or traditional governmental functions of states and their political subdivisions. The decision was limited to the minimum wage and maximum hours provisions of the Act and did not extend to the Act's equal pay and child labor provisions or to the Age Discrimination in Employment Act.

Under *National League of Cities*, schools and hospitals, fire prevention, police protection, sanitation, public health,

and parks and recreation were held to be traditional functions of state and local government and, as such, exempt from the Fair Labor Standards Act. On December 21, 1979, the Department of Labor issued final regulations defining traditional and non-traditional functions of state and labor government for purposes of determining whether the Fair Labor Standards Act was applicable. In its regulations, the Department of Labor added libraries and museums to the functions originally determined by the Supreme Court to be traditional (29 CFR 775.4). The Department of Labor defined local mass transit systems, along with seven other functions, as non-traditional (29 CFR 775.3).

A number of public transit authorities challenged the validity of the Department of Labor determination that provision of local mass transit was a non-traditional governmental function. Ultimately, the Supreme Court was presented with the question whether the Department of Labor determination was a proper application of *National League of Cities*.

On February 19, 1985, the Supreme Court expressly overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Authority*, U.S. , 105 S.Ct. 1005 (1985), which restored the full application of the Fair Labor Standards Act to state and local governments. Reasoning that it had "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause," the Court described its previously promulgated "traditional governmental function" test as "doctrinally barren," and held that "[s]tate sovereign interests • • • are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1017, 1018, 1021.

After enumerating various instances where the states "have been able to exempt themselves from a wide variety

of obligations imposed by Congress under the Commerce Clause," the Court observed:

> The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended. (105 S.Ct. at 1020).

As a result of the *Garcia* ruling, states and their political subdivisions are now subject to all Fair Labor Standards Act requirements, including the 171 and 212 maximum hours standard available under section 7(k) for law enforcement and fire protection employees, respectively.

III. Legislative Background

Following the Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, which overturned the Court's earlier decision in *National League of Cities* v. *Usery* and thereby upheld the authority of Congress to extend the protections of the Fair Labor Standards Act to state and municipal employees, the Committee began to attempt to assess the impact of the Act upon municipal employees, governments, and budgets.

The Committee immediately began to meet with representatives of state and local governments from across the nation, as well as representatives of employee organizations to develop a clear understanding of the impact of compliance.

The estimated cost of compliance to state and local governments ranged initially from a high of $3 billion to a low of $200 million nationwide. Obviously, this large divergence necessitated careful review in order to make sound recommendations to the House. It was essential that those individuals and groups making estimates on compliance projected costs fully understood the Act and those employment practices permitted by the Act. Without this understanding estimates would be greatly in

error. Following are copies of correspondence with the Congressional Budget Office requesting an estimate of the cost of compliance:

U.S. House of Representatives,
Committee on Education and Labor,
Washington, DC, September 18, 1985.

Mr. Rudolph G. Penner,
Director, Congressional Budget Office, U.S. Congress,
Washington, DC.

Dear Mr. Penner: The Subcommittee on Labor Standards is charged with legislative and oversight jurisdiction of the Fair Labor Standards Act (FLSA). In light of the recent Supreme Court decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, many local officials as well as Members of Congress have urged the Subcommittee to take up the issue of the FLSA as it applies to local governments.

Despite a large number of meetings with officials of public interests groups, states, cities, counties and other local governmental bodies, the Subcommittee staff and I have had a difficult time obtaining reliable estimates of the budget impact that FLSA compliance will have on local governments. Given the importance of this issue both to local governments and their employees the Subcommittee feels that substantive remedial legislation, if warranted, ought to be supported by estimates of financial impact which can be verified. The various estimates of impact received by the Subcommittee to date range from minimal to disastrous with no common denominator which would allow the Subcommittee to extrapolate to reach a nationwide total.

For this reasons, I would like to request the assistance of The Congressional Budget Office in compiling a more accurate estimate of the national impact of the Fair Labor Standards Act on local and state governments. I believe that reputation of the CBO would make such a

figure a good baseline standard against which to weigh other information that we receive in our upcoming hearings.

Thank you for your prompt attention to this important matter.

Very truly yours,

AUSTIN MURPHY *Chairman,*
Subcommittee on Labor Standards.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 18 1985.

HON. AUSTIN J. MURPHY,
Chairman, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has undertaken the study you requested of the potential impact on state and local government budgets of the recent Supreme Court decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority* (105 S.Ct. 1005, 1985). Although we have not completed that study, we have enough information to draw some preliminary conclusions, based on information from over 30 states and communities, from concerned organizaions, and from a review of census data on public finances and employment. Our preliminary analysis indicates that full application of the Fair Labor Standards Act (FLSA) wage and overtime provisions as required by the *Garcia* decision would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would likely decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include

one-time costs that would be incurred to pay for compensatory time accrued but not used in the same pay period, beginning after February 15, 1985.

The costs associated with the *Garcia* decision are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the costs depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extent to which states or communities that are not yet complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employers who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. These factors and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Subcommittee with further information as it becomes available.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

Committee staff members were sent to Los Angeles to obtain more detailed information on the estimated cost to the city and county governments of complying with the

overtime requirements of the Fair Labor Standards Act for firefighters and police officers. Though officials of both governments had presented cost projections at Senate hearings in June and July, those forecasters lacked sufficient detail regarding methodology and variable inherent in the Fair Labor Standards Act compliance had been factored into the calculations.

On October 2 and 3, the staff met with officials of the City and County, and officials of the organizations which represent firefighters and police officers. During those conferences revised cost estimates were submitted and, in some cases, were accompanied by detailed explanations of how the projections were derived. The details provided in the supplementary information proved helpful in gaining an understanding of requirements imposed on those governments in the conduct of their personnel pay practices. These include spending restraints prescribed by state law, as well as obligations dictated by collective bargaining agreements and city/county civil service laws. The meetings helped not only to generate more useful information, but to provide the Committee with more accurate cost estimates with which to assess the degree to which both governments would be able to meet their obligations to firefighters and police officers in accordance with the overtime requirements of the Act.

In addition, the Committee also participated in meetings with local government representatives in Harrisburg, PA, Montpelier, VT, and Portland, Maine, in order to ensure that these individuals and their organizations also correctly interpreted the Act's requirements, since it is clear that many current practices would still be permissible.

Initially, the effects of compliance with the Fair Labor Standards Act were greatly misunderstood by many of those most closely concerned. Information in the first six months following the Supreme Court's decision was largely unavailable, and sometimes found later to be incorrect.

Clearly, the Fair Labor Standards Act permitted the continued use of "comp-time." However, the Act required that comp-time be taken during the same pay period. The extension of pay periods for public safety officers found in Section 7(k) offered even greater flexibility to local governments to continue to use this form of compensation, and therefore reduce estimated costs of compliance.

Also, the Committee's review of compliance efforts revealed the concept of "gap-time." In theory, "gap-time" is that number of hours between the level of hours at which the employer has agreed to pay overtime, and the level required by the Fair Labor Standards Act. Recognizing that the Act requires payment of overtime compensation for hours in excess of a prescribed number of hours worked, and not hours paid, a gap exists in which the employee could be compensated with "comp-time" which could be banked for use beyond the pay period in which the comp-time is earned. The following are copies of correspondence between the Committee and the Department of Labor seeking an opinion on the validity of "gap-time" and the Department's response to a municipal official also seeking an opinion on "gap-time":

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC, October 22, 1985.

HON. AUSTIN J. MURPHY,
Chairman, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of September 27, on behalf of several individuals who have requested opinions from the Wage and Hour Division (WH) of the Department of Labor (the Department), concerning the application of the Fair Labor Standards Act (FLSA) to law enforcement personnel employed by

public agencies. More specifically, these individuals have asked whether police officers may be granted time off with pay for certain hours of work which are "overtime" hours under a State law, local ordinance, or other provision, but are not overtime hours under FLSA.

Due to the great number of inquiries received by WH as a result of the decision by the U.S. Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority et al. (Garcia)*, 105 S.Ct. 1005 (February 19, 1985), there has been some delay in providing responses. Of the more than 700 inquiries received to date, WH has fully responded to over 500. Many of the more complex issues raised are unique and require detailed legal analysis prior to response.

In order to ensure that the remaining inquiries are responded to in a timely manner, a task force of WH personnel has been established to deal with *Garcia*-related issues on an expedited basis.

An opinion letter which fully addresses the issue of granting time off with pay to law enforcement personnel was issued on October 3, in response to one of the individuals whose inquiry you forwarded to us. In response to their requests, copies have been sent directly to the others, as well as to all other individuals who have made inquiries on this issue. I understand that copies of this opinion letter were delivered to Mr. Jim Riley of your staff on October 3.

You may also be interested to know that, in order to be of all possible assistance to public employers whose employees are now subject to FLSA as a result of the *Garcia* decision, the Department has established a toll-free telephone line in Washington, D.C., for the purpose of providing technical assistance: 800-233-FLSA (3572).

The National Office of WH will take calls on this line and provide information on FLSA as expeditiously as possible. Calls may be placed between 8:15 a.m. and

4:45 p.m. (EDT) Monday through Friday by callers located within the continental United States and Puerto Rico.

If I can be of further assistance, please don't hesitate to contact me.

Very truly yours,

WILLIAM E. BROCK.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC, September 27, 1985.

Hon. WILLIAM E. BROCK,
Secretary, Department of Labor,
Constitution Avenue NW, Washington, DC,

DEAR MR. SECRETARY: As you are well aware, their is great deal of confusion as to the true impact of the Supreme Court's decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority*. From the research that the Subcommittee staff has done and from our hearing on Tuesday, September 24th, it has become quite apparent that many local government officials still do not know what Fair Labor Standards Act compliance will mean to their respective jurisdictions. Unfortunately, many well intentioned municipal managers are misinterpreting the Act, and the result is many of the estimates of projected budget impact received by the Subcommittee are in error.

One area in particular that has caused a great deal of misunderstanding is the question of compensatory time-off or "Comp-Time" allowable under the Act, using the difference in hours between contractual overtime provisions and the statutory requirements for overtime pay as defined in the regulations (so called "Gap-Time"). In the case of uniformed public safety personnel, the 1974 FLSA amendments require overtime pay after approxi-

mately 43 hours per week for police and 53 hours per week for firefighters. Through our meetings and our hearing we have learned that many municipal contracts covering such employees provide for overtime pay or compensatory time-off for all hours worked in excess of 40 hours, or after some number of hours less than that prescribed by the Act.

Obviously, this raises the possibility that many local government employers could continue to offer "Comp-Time" to their employees within the framework of FLSA. As long as those overtime hours compensated with "Comp-Time" are accumulated in the "Gap" between the contractual stipulation for overtime compensation and the statutory requirements of the FLSA it would appear to be permissable under the Act.

Attached are copies of correspondence sent to the Department seeking clarification as to the legality of such an agreement. According to testimony received at our hearing, Mr. James Valin, Assistant Administrator of the Wage and Hour Division, apparently stated in a workshop conducted by the Department for local government managers and labor representatives that this type of arrangement is permissible under the Act. We have been told that this was also confirmed in subsequent conversations with the Wage and House office in Washington. Yet to date, the Department has either been unwilling or unable to provide a formal response to these and other urgent letters seeking guidance. I am sure that you will agree that this situation is totally unacceptable as are the reports that we have received of governmental officials and labor representatives calling local DOL offices and receiving erroneous information or advise on FLSA compliance.

As I am sure you realize, if in fact municipalities and their employees can continue to accrue "Comp-Time" under the provisions of the Fair Labor Standards Act the cost estimates and stated impact of the Act upon municipalities would be greatly reduced. I would therefore appreciate your responding to the Subcommittee as soon as possible as to whether my interpretation of the Act is correct. May local governments operate "Comp-Time" programs in compliance with the Act as the regulations at 29 CFR 553.19 would seem to suggest?

Thank you for your personal attention to this matter, and I look forward to your timely response. I also hope that you will encourage the Employment Standards Administration to make every effort to provide prompt and accurate advice and counsel to local, state, or labor officials who seek assistance in regard to FLSA compliance.

Very truly yours,

AUSTIN J. MURPHY, *Chairman,*
Subcommittee on Labor Standards.

U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WAGE AND HOUR DIVISION,
Washington, DC, October 3, 1985.

This is in response to your letter of July 24 concerning the effect of the decision by the U.S. Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority et al. (Garcia)*, 105 S.Ct. 1005 (Feb. 19, 1985), on the application of the Fair Labor Standards Act (FLSA) to law enforcement personnel employed by the city of . You ask, on behalf of the , whether police officers may be granted time-off with pay for certain hours of work which are "overtime" hours under a State law, local ordinance, or other provisions, but are not overtime hours under the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

Subsequent to your inquiry, we also received a letter from the Office of the City Attorney of , which

provided us with additional information related to the matter of your concern.

You describe a situation where a city has established, pursuant to section 7(k) of FLSA, a 7-day work period for the purpose of computing and paying overtime pay for its police officers. You further indicate that the city and the police officers have negotiated a collective bargaining agreement (CBA) that provides for overtime pay for all hours worked over 40 in a workweek. The CBA also provides that any hours worked over 40 up to 43 in a week may be taken as time-off with pay at a subsequent time. Hours worked over 43 in the 7-day work period would be paid at one and one-half times the employee's regular rate of pay. The CBA provides that time-off earned as outlined above may be accrued without limit.

You ask if the city's method of compensating police officers is in compliance with section 7(k) of FLSA. Assuming the response to be in the affirmative, you ask if it would also hold true for any work period up to 28 days.

Under the FLSA, payment of both the minimum wage (currently $3.35 an hour) and overtime compensation due an employee must ordinarily be made at the regular payday for the period in which the overtime work was performed. It has been a long established principle that an employer may not credit an employee with time-off with pay (even at a time and one-half rate) for FLSA overtime earned which is to be taken at some mutually agreed upon date subsequent to the end of the pay period in which the overtime was earned rather than pay cash for the overtime as it is earned. This principle has been upheld by the U.S. Supreme Court (see *Walling* v. *Harnischfeger Corporation*, 325 U.S. 427 (1945)).

Section 7(k) of FLSA provides a partial overtime compensation exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions).

Under this provision, a public employer may establish a work period of from 7 to 28 consecutive days in lieu of the workweek for the purpose of computing and paying overtime compensation to fire protection and law enforcement personnel.

Section 7(k) of FLSA is explained generally on pages 18 and 19 of WH Publication 1459, copy enclosed. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period. The regulations of the U.S. Department of Labor relating to the employment of fire protection and law enforcement employees of public agencies are set forth in 29 CFR Part 553 (copy also enclosed).

Section 553.19 of 29 CFR Part 553 explains that section 7(k) of FLSA creates a partial exception to the general rules with regard to the payment of overtime compensation to fire protection and law enforcement employees. Where there is, for example, a State law, local ordinance or other provision, which requires overtime compensation to be paid to such employees at some point earlier than that required by section 7(k) (e.g., for any hours worked in excess of 40 in a week), and that requirement can be met by providing an employee time-off with pay in later pay periods, the practice of providing time-off with pay for these hours of work, which are not FLSA overtime hours, can be continued provided two conditions are met:

(1) The first condition is that the wages which are paid to an employee must, when divided by his or her hours of work during the work period, average no less than the minimum wage.

(2) The second condition is that the employee must be paid not less than one and one-half times his or her regular rate of pay for each FLSA overtime hour of work.

Whenever these two conditions are met, the employee may be granted time-off with pay for hours of work which are not FLSA overtime hours under section 7(k).

Where a police officer is to be paid overtime compensation for hours of work in excess of 40 in a week pursuant to a State law, local ordinance, or other provision, but may elect to take time off with pay in lieu of this overtime compensation, such a practice can be continued to a limited degree. For example, where a police officer is paid $10 an hour and works 45 hours in a 7-day work period, he or she may elect to be credited with time-off with pay at a rate of one and one-half hours off for each hour worked, in lieu of cash wages, for the 3 hours from 41 to 43. In addition, the 44th and 45th hours would be paid at one and one-half times the regular rate of pay, as required by section 7(k) of FLSA. In such a situation, the following calculations must be performed to determine whether the conditions referred to above for granting time-off with pay are met.

The first calculation that must be made is to determine whether the wages paid to the police officer for the work period equal at least the statutory minimum wage. In this situation, the police officer has been paid $420 in straight-time wages for 42 hours of work (40 hours + 2 FLSA overtime hours = 42 × $10 (the hourly rate) = $420). When the $420 is divided by 45 (total hours worked), the employee has been paid an average of $9.33 an hour. Since this is more than the minimum wage, the first condition set forth in section 553.19 for granting time-off with pay is met.

The second condition set forth is that the police officer must be paid, in cash, not less than one and one-half times his or her regular rate of pay for each overtime hour of work under section 7(k) of FLSA. For this example the maximum work hours standard for law enforcement personnel is 43 hours for a 7-day work

period. As the police officer has worked 45 hours during the established work period, he or she would be due 2 hours of FLSA overtime pay (45 hours — 43 hours = 2 hours). As explained in section 553.19(b), the employer must include the cash equivalent of any time-off that the employee has earned when computing the employee's regular rate of pay. This is to assure that the employee's regular rate of pay under section 7(k) is not reduced as a result of participation in a time-off program.

The cash equivalent of the time-off, for purposes of this calculation, shall be $10, the straight-time component of the time-off credit. The cash equivalent ($5) of the "premium" credit for hours worked in excess of 40 in a week pursuant to the State law, local ordinance, or other provision, would be excludable from the regular rate of pay under section 7(e)(5) of FLSA since, although not actually paid, it is similar to the payments excludable under that section. Section 7(e)(5) excludes from the regular rate the payment of a premium rate for hours worked in excess of 8 in a day or in excess of an employee's normal or regular working hours. Similarly, because the cash equivalent of the time-off is included in the regular rate in the week in which it was earned, it would not be considered in determining the regular rate in the week in which the employee takes the time-off.

Therefore, the employee's regular rate of pay would be computed as follows:

Compensated hours—42 hours × $10.00=	$420
Time-off credit—3 hours × $10.00=	30
Cash equivalent of wages paid	450

Computation of FLSA overtime pay:

$450 ÷ 45 hours = $10 (the regular rate of pay)

2 overtime hours × .5 (overtime premium) × $10=$10

The police officer would thus be due $430 ($420 + $10) for his or her hours of work during the 7-day work period.

In this example, the officer would be credited with 4.5 hours of time-off with pay (3 hours × 1.5 = 4.5 hours) for use at some future date. It must be emphasized, however, that time-off with pay is permissible only for hour considered to be "overtime" hours under a State law, local ordinance, or other provision, but not for overtime hours under FLSA. It must be further emphasized that this position applies only to fire protection and law enforcement employees paid pursuant to section 7(k) of FLSA, which was established by Congress in recognition of the uniqueness of their activities.

The principles outlined above would be applicable for a work period of any length under section 7(k) of FLSA.

We trust that the above is responsive to your inquiry. If we can be of further assistance to you, please do not hestitate to contact us again.

Sincerely,

HERBERT J. COHEN,
Deputy Administrator.

In addition to the issue of "comp-time" several other concerns became apparent. Extension of the Fair Labor Standards Act to state and local government employees created a great deal of confusion over the status of volunteers. Although the Department of Labor had already published comprehensive regulations on the definition of volunteers and volunteer activities, the reliance of many public agencies on volunteers produced considerable concern among officials less familiar with the Act and the Department's regulations. In view of these persistent concerns the Committee has drafted suitable language allowing this valuable service to continue, while at the same time ensuring that those individuals classified as volunteers were actually volunteers in the true sense of the word.

Also, many municipalities had concerns about joint employment and occasional employment practices that had previously operated to the mutual benefit of both the employer and employee. Many public agencies had requirements that persons holding public events in the municipality hire off-duty public safety officers for crowd control or security functions. Since those employees agreed to be employed at their own option the Committee believes that these activities should not be unduly prohibited.

Similarly, many municipal employees had engaged occasional part-time employment for their employer in a different capacity at the employee's option. Again, since this type of activity had proven beneficial to both the employer and employee it seemed inconsistent to prohibit their occurrence as long as restrictions exist to prevent abuse.

The Court's decision in *Garcia* suddenly required all state and local governments to comply with the Act, and therefore immediately made those governments liable for any violations of the Act. The Committee realized that it was unrealistic to expect these state and local governments to be in conformance with the Act that quickly, and the Committee agreed that it was necessary to consider means of relieving that liability for a reasonable period of time to enable the governments to comply, while at the same time recognizing the rights of the employees.

It became apparent to the Committee that the needs of state and local governments were unique and that it was necessary to amend the Fair Labor Standards Act. Many municipal employees both enjoy "comp-time" and need it to enable them to better perform their jobs. Also, the confusion resulting from the classification of volunteers, and the mandates of many governments that off-duty public safety personnel be hired to perform functions by separate and independent public employers required clarification in the Act.

IV. Purposes of the Legislation

In seeking to guarantee fundamental standards for all working Americans, the Fair Labor Standards Act is one of the nation's most significant efforts to direct economic resources into socially desirable channels. The minimum wage protections in section 6 of the Fair Labor Standards Act reflect a national policy that workers should not be forced to work at hourly wages that are below acceptable living levels. The longstanding purposes of the overtime provisions in section 7 are to fairly and fully compensate employees who must work long hours while encouraging employers to reduce the hours of work and to hire additional persons.

By 1974, Fair Labor Standards Act coverage extended to three-fourths of the nation's workers. Federal, state, and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* v. *San Antonio Metropolitan Transit Authority* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 Fair Labor Standards Act amendments. The rights and protections accorded to employees of the federal government and the private sector also are extended to employees of the states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the states occupy a special position in our constitutional system." The Committee recognizes that state and local governments, unlike other employers, have special responsibilities in promoting the public good. In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, some of the states and their political subdivisions have identified several areas in which they would be adversely affected by immediate application of the Fair Labor Standards Act. This legislation responds to these concerns by adjusting certain Fair Labor Standards Act principles with respect to employees of states and their political subdivisions and by deferring the effective date until April 15, 1986 of certain provisions of the Fair Labor Standards Act insofar as they apply to the states and their political subdivisions.

The Committee recognizes that the financial costs of compliance with the Fair Labor Standards Act—particularly the overtime provisions of section 7—are a matter of serious concern to many states and localities. The Committee has received extensive testimony on this subject from representatives of state and local governments as well as from organized labor. Although the testimony reflects sharp disagreements as to the nature and extent of the Fair Labor Standards Act compliance costs, the Committee concludes that states and localities required to comply with the Fair Labor Standards Act will be forced to assume some additional financial responsibilities.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet Fair Labor Standards Act standards immediately under *Garcia*. Many jurisdictions properly and successfully have undertaken to do so and the Committee commends their efforts to comply with the basic overtime protections afforded by the statute. Other jurisdictions, however, have expressed an urgent need for a phase-in so that they may reorder their budgetary priorities while maintaining fiscal stability in response to the immediate impact of *Garcia*. Following the example of the 1974 amendments the Committee again allows for a phase-in for state and local governments to comply with certain requirements of the Fair Labor Standards Act.

The Committee is also aware that many state and local government employers and their employees have agreed to voluntary arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of formal collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, the bill accommodates such pre-existing arrangements. In addition, the bill offers these employees and their employers the opportunity to voluntarily agree to the acceptance of compensatory time off at a premium rate in lieu of pay for overtime.

The bill provides for the determining of overtime compensation for special detail work by fire protection and law enforcement employees, occasional or sporadic employment by public employees and the substitution of work by fire protection and law enforcement employees. The bill excludes volunteers from the minimum wage and overtime requirements of the Act and exempts employees of state and local legislative bodies, except legislative library employees, from coverage.

The bill prohibits any discrimination by a state or local government employer against an employee with respect to wages or other terms and conditions of employment because of asserted coverage under section 7 of the Fair Labor Standards Act since the *Garcia* decision on February 19, 1985. While the Committee has postponed the obligation of these employers to comply with the Fair Labor Standards Act overtime provisions, their employees should not be left without a remedy if they have been subjected to discriminatory treatment in their compensation or employment conditions as a result of their assertion of coverage under the Act. Accordingly, employees who are, or have been, victims of such discrimination may pursue full relief under Fair Labor Standards Act sections 16 and 15(a)(3).

V. Comments on Major Provisions

A. COMPENSATORY TIME

Section (2) of the bill amends section 7 of the Act to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees. The new subsection 7(o), created by this bill, would authorize public employers to provide compensatory time off in lieu of monetary overtime compensation that otherwise would be required by the relevant provisions of section 7 of the Act regarding various types of employees. Compensatory time received by an employee in lieu of cash must be at the premium rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one-half times the regular rate of pay.

One of the main areas of complaint from many state and local government employers, as well as some groups of employees, was the general prohibition against awarding compensatory time off for overtime work in lieu of monetary compensation. The Fair Labor Standards Act customarily has been interpreted by the Secretary of Labor as precluding the use of compensatory time for statutory overtime hours. In addition, consistent with the purposes of the Fair Labor Standards Act, the obligation to compensate employees at the rate of time and one-half created a financial incentive for employers to reduce hours and hire more employees whereas the widespread use of non-premium compensatory time would frustrate the achievement of these objectives.

Previously, as noted in this report, compensatory time within the framework of the Act was limited to compensatory time off within the same pay period, usually to ensure that the employee did not exceed the maximum of

straight time hours permitted under section 7 of the Act. Existing compensatory time systems have also operated within the so called "gap time" between contractual obligations to pay overtime and the requirements of the statute. While "gap time" compensatory time could be accumulated and held beyond the immediate pay period as stipulated in the regulations promulgated by the Secretary of Labor and found at 29 CFR 553.19, these arrangements were nevertheless much more restricted than most traditional compensatory time systems.

While the Committee appreciates the employee protection principles and job creation purposes of the overtime provision of the Fair Labor Standards Act, it also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or longstanding arrangements where compensatory time off was provided for overtime hours worked by the employees. The *Garcia* decision and with it the re-application of the Fair Labor Standards Act to most public employees effectively ended most traditional compensatory time systems. It, therefore, eliminated the freedom and flexibility enjoyed by public employees and the additional options such systems have provided to the public employer faced with extraordinary demands for public services yet constrained by strict limits on available revenue.

Keeping in mind the fundamental protections afforded to employees under the Fair Labor Standards Act, the Committee concludes that compensatory time should be available to state and local government workers and their employers under certain conditions. Accordingly, a new subsection 7(o) is added to the Fair Labor Standards Act to provide state and local government employees with the opportunity to be compensated for overtime hours with compensatory time off in lieu of monetary compensation. Compensatory time would be allowed pursuant to an agreement entered into between the employers or their representative and the employer prior to the performance of the overtime work, or with prior notice to the em-

ployees, provided that the hours for compensatory time granted in lieu of cash are compensated at the premium rate of not less than one and one-half hours for each hour of overtime work. The Committee encourages employers and employees to enter into such mutual agreements to the extent possible.

1. Agreement or understanding

The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and employee, or notice to the employee, prior to the performance of the work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee.

The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with this subsection and the remainder of the Act.

In the case of employees who have no representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding compensatory time in lieu of overtime pay shall be deemed to have

reached an agreement or understanding with these employees as of April 15, 1986. The primary purpose of this provision is to protect those pre-existing practices where employees and employers have utilized compensatory time instead of cash payments for overtime work. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee prior to the effective date of this subsection.

If, however, a regular practice of awarding compensatory time to employees without a representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. A practice of awarding compensatory time in lieu of overtime pay initiated by an employer between the date of enactment and April 15, 1986 would not be a regular practice of sufficient duration to permit the employer to avoid the obligation to enter into an agreement or understanding with, or providing prior notice to, the affected employees.

As mentioned above, the compensatory time provisions are designed to allow the preservation of regular past practices that have proved mutually beneficial to employees and employers, and to afford the parties the opportunity to enter into appropriate agreements allowing the acceptance of compensatory time rather than cash payments.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations. An employee whose work includes on a regular or recurring basis public safety activity, emergency response activity, or seasonal activity may accrue a maximum of 480 hours of compensatory time. Employees performing work in other activities may ac-

crue compensatory time up to a maximum of 180 hours. Hours accrued prior to April 15, 1986, do not count toward these limits. The 480 hour limit represents 320 hours of actual overtime worked, and the 180 hour limit represents 120 hours of actual ovetime worked, times the one and one-half premium rate. Once these limits are reached, an employee either must be paid in cash for additional accrued hours or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time off. For example, if a law enforcement employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue another 30 hours at the premium rate. But if that employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 or 180 hours must be accrued before compensatory time may be used.

The Committee does not intend that employees whose work includes seasonal, emergency response or public safety activity as well as other work be subject to two different limits on accruable compensatory time. As long as the employee's work regularly includes the activities included in the higher cap, the employee will be covered by the higher cap. The Committee does not expect to find that after the enactment of these amendments local government employees are suddenly reclassified with additional designations as emergency personnel. Similarly, the Committee assumes that local government administrators will resist the temptation to assign their clerical employees or their support staff to an afternoon of shoveling snow on the courthouse steps or a day with the ambulance crew simply to bump the compensatory time cap to the higher level. The Committee expects good faith compliance by public employers and would direct the Secretary

of Labor to enforce these amendments so as to prevent such attempts to evade Congressional intent.

Considerable focus has been given to the question of seasonal activity. Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. Obviously, parks and recreation activity in general are primarily seasonal since they experience peak demand during fair weather seasons or other sport seasons and largely dormant periods at other times. Road crews, while not necessarily seasonal workers, may nevertheless have significant periods of peak demand, for instance during the snow plowing or road construction season. In such an instance the snow plow operator/road crew employee would be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap. Auditoriums, theaters, and sports facilities that are open for specific limited seasons, would meet a seasonal test, facilities that operate year round would not. Mere periods of short but intense activity do not make an employee's job seasonal in nature; therefore, clerical employees working increased hours for several weeks on a city budget or processing insurance forms or tax notices would not need the higher compensatory time cap since the limited periods of increased activity could be accommodated within the lower limit. In determining which employees would be considered seasonal, the Secretary of Labor should first determine whether the "seasonal activity" is a regular and recurring aspect of the employees' work and then whether the projected overtime hours during the "season" of significantly increased demand exceeds the number of compensatory time hours available under the lower cap.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued compensatory time subject to this subsection. It is expected that the rate of compensation for cashing out accrued

compensatory time shall be at the presumably higher rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued compensatory time.

The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee is separated from a job voluntarily (including retirement), is terminated by an employer, dies, or otherwise leaves a job. At a minimum, the employee is entitled to be paid for the usual compensatory time at a rate not less than the average rate received by such employee during the last three years of the employee's employment. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of compensatory time, that request should be honored unless to do so would be unduly disruptive. By the term "unduly disrupt," the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June or hunting season probably would not be unduly disruptive.

The Committee is very concerned that public employees in offices with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation. Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work.

B. SPECIAL EMPLOYMENT SITUATIONS

A new subsection 7(p) is added to the Fair Labor Standards Act to address the area of joint employment and other special employment situations. Under the current Fair Labor Standards Act joint employment regulations, there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of the hours worked credited to one employer for purposes of determining overtime liability. The Committee preserves this Fair Labor Standards Act protection so as to prevent such abuses as manipulation of job scheduling or rotation of workers to circumvent overtime requirements. At the

same time, the Committee recognizes that there are exceptional circumstances for which special provisions should be made as discussed below.

1. Special detail work

An employee engaged in public safety activities is at time offered to accept optional special detail work for a separate and independent employer on the employee's off-duty time. These special details include the police officer who accepts extra employment from a school board to direct traffic at a football game, or from a promoter to furnish crowd control at a rock concert or convention. Such opportunities may result from a local legal requirement promulgated by the governing body which is also the employee's primary employer. The requirement may specify that a separate and independent employer must hire sworn law enforcement personnel for these functions, pay such personnel through the primary employer's payroll system, or otherwise adjust or alter their ordinary working conditions. In these situations, the current Fair Labor Standards Act joint employment regulations require that the hours worked for the separate and independent employer be combined with the hours worked in the employee's primary job in the calculation of overtime. Under this subsection, the joint employment rule would not apply so long as (1) the special detail is worked solely at the employee's option; (2) the two employers are in fact separate and independent; and (3) the primary employer requires, facilitates or affect the performance of the work, as set forth in subsections 7(p)(1)(A), (B), and (C). For example, a school system's employment of police officers to direct traffic at a football game where local ordinance requires that only sworn police officers be used for such duty and where the work is solely at the option of the police officers would qualify for separate treatment under the exception to the Fair Labor Standards Act. By contrast, the assignment of special details

of policy officers to cover the extra load of police work required by a large convention where that assignment is not solely at the option of these officers would not qualify. This would be true even if the body holding the convention reimburses the primary employer for the costs of these services. An employee choosing to work for a separate branch of his or her employer does not qualify for the special detail provisions.

2. Occasional employment in a different capacity

An employee of a state of local government may have the opportunity to work at his or her option on an occasional or sporadic basis in a different capacity from his or her regular employment. The Committee recognizes that in the delivery or certain types of public services there is from time to time a need for additional resources to deal with special events or certain types of activities. Public recreation and park facilities and related stadium and auditorium activities often provide this type of occasional employment opportunities. Types of employment might typically include officiating at youth or other recreation and sports events, even if the events or activities follow a regular schedule on a seasonal or other basis, taking of tickets, security for special events, and food and beverage sales at special events. To meet these recurring but intermittent needs, a public park and recreation agency or school district may employ an individual who is otherwise employed by the same employer in another capacity or another employer in the same government jurisdiction.

The Committee recognizes that this type of activity, entered into freely by the employee, mutually benefits both the employee and the employer. For the purposes of this Act, this type of employment is considered employment in a second capacity and as such it would not be considered as hours worked for the purposes of calculating overtime pay or compensatory time.

However, additional work regularly performed on a scheduled basis by a public park and recreation employee in a second job for the agency would be considered as hours worked for the same employer. An example would be an employee who, in addition to his or her regular job, also regularly works additional hours at a park food and beverage sales center.

The Committee expects the Secretary of Labor in promulgating regulations to interpret "different capacity" in the strictest sense so as to prohibit instances where a public safety employee might be encouraged to take on any kind of security or safety function within the same local government. The Committee clearly intends "different capacity" to bar any occasional or sporadic assignments within the same general occupational category as the employee's regular work.

3. Substitute work hours

Public employees have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee. Current Fair Labor Standards Act regulations may raise questions as to the propriety of such a practice. Subsection 7(p)(3) would allow one employee to substitute and work for another such employee if the substitution was (1) voluntarily undertaken and agreed to solely by the employees and (2) approved by the employer. If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule. Employers of employees who perform substitute work under this subsection are not required to keep a record of the hours of the substitute work for purposes of overtime compensation.

C. VOLUNTEER SERVICES

A new paragraph 3(e)(4) is added to the Fair Labor Standards Act to make clear that persons performing

volunteer services for state and local governments should not be regarded as "employees" under the statute. The Committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes. At the same time, the Committee wishes to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon employees to "volunteer."

To this end, the paragraph provides that an individual who performs services on a volunteer basis for a state or local government shall not be deemed an employee for Fair Labor Standards Act purposes, even if the individual receices expenses, a nominal fee or reasonable benefits to perform the services. Thus, for example, a volunteer school crossing guard does not become an "employee" because he or she receives a uniform allowance and/or travel expenses.

An individual employed by an employer may volunteer to perform a service for the same employer if that service is in a capacity different from that individual's regular job. For example, a clerk at a state mental health facility may volunteer to visit with patients or take them on outings. However, an individual who is employed by one employer will be considered an employee under the Fair Labor Standards Act if the individual volunteers to provide the same type of services for the same employer. To illustrate, a nurse employed by a state hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however, perform such services as a volunteer at a county clinic.

In section 3, a new subparagraph (B) is added which provides that a state or local government employee may perform volunteer services for another public agency without regard to the Fair Labor Standards Act overtime requirements, even if the two governmental entities have entered into a mutual aid agreement. Thus, where Town A and Town B have entered into a mutual aid agreement,

a fire fighter employed by Town A who also is a volunteer fire fighter for Town B will not have his or her hours of voluntary services for Town B counted as part of his or her employment with Town A.

The Secretary of Labor is directed to issue regulations to implement this section by March 15, 1986. If, prior to April 15, 1986, a state or local government had a practice of treating certain individuals who performed services as volunteers, these individuals shall be considered volunteers rather than employees until April 15, 1986, for purposes of the Fair Labor Standards Act. In addition, state and local governments are relieved of liability for a violation of the minimum wage provisions of section 6 of the Fair Labor Standards Act occurring before April 15, 1986 with regard to services performed for the public agency by an individual who was performing such services as a volunteer.

Additionally, in order to assuage the serious, even if unfounded, concerns of some local officials, the Committee wishes to clarify the status of jurors. The Fair Labor Standards Act as it applies to state and local government entities, is not intended by the Congress to include as employees covered by the Act individuals who received a fee in connection with performance of a civic responsibility. Such fees are honoraria and are not wages or salaries.

D. EMPLOYEES OF STATE AND LOCAL LEGISLATIVE BODIES

The exemption from the Fair Labor Standards Act's overtime provisions for employees of state and local legislative bodies is intended to exempt these employees to the same extent as employees of the Congress are exempted under section 3(e)(2)(A). Therefore, just as employees of the Library of Congress are not exempt from these provisions, neither are employees of a state or local legislative library. Existing law provides a series of exemptions for state and local legislative employees, but questions have been raised as to whether these exemptions are

as broad as the Congressional exemption. The purpose of this new provision is to clarify that this is now the case.

It is not the intent of the provisions embodied in section 5 of these amendments to exempt employees of school districts or higher education institutions who do not qualify for exemption under another provision from coverage under the Fair Labor Standards Act.

E. REGULATIONS

The Secretary of Labor is directed to issue regulations by April 15, 1986 which implement certain provisions of the amendments. However, the Secretary is directed to issue regulations by March 15, 1986 with regard to section 4 of the amendments. This directive is consistent with the traditional statutory responsibility and the authorization given to the Secretary of Labor to prescribe regulations interpreting the Fair Labor Standards Amendments of 1974 with respect to the local, state and federal employees who were brought under the Act at that time. The Committee encourages the Secretary of Labor to publish these regulations as soon as possible in order to provide adequate opportunity for comment, promulgation, and implementation.

F. EFFECTIVE DATE

The amendments to section 7 (compensatory time and joint employment) and section 3 (volunteers and employees of state and local legislative bodies) take effect April 15, 1986 (except that the Secretary of Labor is to promulgate applicable regulations prior to that date). State and local government employers who are engaged in traditional functions as described by the Regulation at 29 CFR 775.2 and 775.4 (schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation, libraries, museums) are relieved of overtime liability until April 15, 1986. The Committee has deferred application of the Act's overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make appropriate adjustments in their work practices, staffing patterns, and fiscal priorities. Further, because many state and local governments begin their fiscal years on July 1, the amendments allow actual payment of monetary overtime compensation to be delayed until August 1, 1986 without penalty. Liability, however, in all instances will commence on April 15, 1986. The compensatory time provisions described above also become applicable to existing collective bargaining agreements on that date. The provision prohibiting discrimination shall take effect upon enactment.

The April 1986 effective date is not intended to encourage public employers from postponing their efforts to comply with the Act's overtime provisions. To the contrary, the Committee lauds those jurisdictions that have taken, and continue to take, positive action regarding employees overtime protection consistent with the Act.

Finally, these amendments do not affect whether employees of state and local governments who are engaged in nontraditional functions as defined by the Department of Labor at 29 CFR 775.3, notably local mass transit systems, are covered by the Act prior to April 15, 1986. The Committee is aware that the question of whether transit employees, prior to the decision in *Garcia*, were entitled to the Act's compensation for overtime hours worked is still being litigated in federal courts. The amendments are intended to protect the rights of both parties to resolve their differences through litigation, without taking a position on the matter.

G. DISCRIMINATION

Section 8 of the bill makes it unlawful, on or after February 19, 1985, for any state or local government entity to discriminate against an employee with respect to his or her wages or other terms or conditions of em-

ployment because of the employee's asserted coverage under the overtime provisions of the Act. It is the Committee's intention that employees who are victims of such discrimination may seek relief available under Section 15(a)(3) and Section 16 of the Act. For example, an employer who reduces an employee's straight time wages or regular rate of pay simply because of asserted Fair Labor Standards Act coverage would be liable under this provision. Further, this provision would prohibit the discharge, or any other form of retaliatory action, taken against an employee because of assertion of coverage under the Act. The Committee encourages employers to make every effort to conform to the fundamental standards of the Act.

VI. Committee Consideration

The Subcommittee on Labor Standards convened a hearing on the impact of compliance with the Fair Labor Standards Act on state and local governments on September 24, 1985. Testimony was received from the following individuals and organizations.

Hon. Edward Koch, Mayor, New York, NY on behalf of the National League of Cities and the U.S. Conference of Mayors;

Victor Gotbaum, Director, District 29, American Federation of State, County and Municipal Employees;

John J. Sweeney, General President, Service Employees International Union;

John A. Gannon, President, International Association of Firefighters;

Robert Thompson, President, Amalgamated Transit Local #694, San Antonio, Texas;

Eric S. Lamar, President, International Association of Firefighters Local #2068;

Gary Brazgel, President, Milwaukee Police Association;

Robert Porter, Secretary-Treasurer American Federation of Teachers;

Hon. Edward R. Zuccaro, Member, Vermont House of Representatives, on behalf of the National Council of State Legislatures;

Hon. Anita Anderegg, County Executive, Fond du Lac, WI, on behalf of the National Association of Counties.

H.R. 3530 was unanimously reported to the Committee on Education and Labor by the Subcommittee on Labor Standards on October 10, 1985.

Full Committee Rollcall Statement

The Committee on Education and Labor reported this bill as amended by voice vote on October 23, 1985.

Congressional Budget Office Estimate

In compliance with clause 2(1)(3)(C) of Rule XI of the Rules of the House of Representatives, the estimate prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974, submitted prior to the filing of this report, is set forth as follows:

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 24, 1985.

Hon. Augustus F. Hawkins,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 3530, the Fair Labor Standards Amendments of 1985, as ordered reported by the House Committee on Education and Labor, October 23, 1985.

We estimate that this bill would have no cost to the federal government, and would result in significant savings for state and local governments.

H.R. 3530 would amend the Fair Labor Standards Act (FLSA) as it now applies to nonfederal units of government. The bill would allow states and localities to grant employees one and one-half hours of compensatory time off for every hour of overtime worked, in lieu of paying cash premiums for overtime. The bill would require that public safety and seasonal employees receive cash compensation for overtime after accumulating 480 hours of compensatory time. All the public employees would have to receive cash compensation for overtime after accumulating 180 hours of compensatory time. Jurisdictions that maintain collective bargaining relationships would be allowed to preserve contract provisions that provide compensatory time for overtime. Public employees would be allowed to use accrued compensation time within a reasonable amount of time. Upon termination of employment, unused compensatory time would have to be paid for based on the average rate of pay received by an employee during the last three years of employment.

H.R. 3530 would further amend the FLSA to exclude from the calculation of overtime occasional part-time or volunteer work by public employees for different agencies within the same jurisdiction or for a different jurisdiction. Persons working for nonfederal units of government on a voluntary basis and all persons employed by state and local legislative bodies, except employees subject to civil service laws and library personnel, would be exempt from coverage under the FLSA.

Finally, H.R. 3530 would set April 15, 1986 as the compliance date for applying the FLSA to state and local employees and would allow public employers to delay payments for overtime until August 1, 1986. Any FLSA liability that may exist prior to April 15, 1986 would be eliminated.

CBO estimates that no cost to the federal government would result from enactment of this legislation, because it would not significantly affect the amount of Department of Labor activity in enforcing the FLSA. CBO estimates, however, that H.R. 3530 would significantly reduce the budget impact of extending the FLSA to state and local governments, as would be required under the recent Supreme Court decision in the case of *Garcia v. San Antonio Metropolitan Transit Authority* (105 S. Ct. 1005, 1985).

CBO has not completed its study of the potential impact of the *Garcia* decision on state and local government budgets. Our preliminary analysis, based on information from over 40 states, communities, and concerned organizations, indicates that full application of the FLSA wage and overtime provisions as required by that decision would result in initial annual compliance costs totaling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include one-time costs that would be incurred to pay for compensatory time accrued but not used in the same pay period, beginning after February 15, 1985.

We estimate that the bill would save most of these compliance costs, by delaying compliance with the FLSA standards until April 1986, eliminating retroactive liability, and restoring the option of using compensatory time off rather than cash payments for overtime. The costs associated with the *Garcia* decision and the savings resulting from this bill are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the savings depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extent to which states or communities that are not yet

complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employees who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. This factor and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Committee with further information as it becomes available.

With best wishes,

Sincerely,

ERIC HANUSHEK
For Rudolph G. Penner, Director).

COMMITTEE ESTIMATE

With reference to the statement required by clause 7(a)(1) of Rule XIII of the Rules of the House of Representatives, the Committee agrees with the estimate prepared by the Congressional Budget Office.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 3530 will have no significant inflationary impact on prices and costs in the operation

of the national economy. The principal result of this legislation will be to enable state and local governments to use compensatory time in lieu of payment of monetary overtime compensation for overtime hours worked by their employees. State and local governments should therefore be able to comply with the Fair Labor Standards Act without necessitating increases in their taxes.

COMMITTEE OVERSIGHT REVIEW

With reference to the statement required by clause 2(1)(3)(A) of Rule XI of the Rules of the House of representatives regarding any findings or recommendations pursuant to this Committee's oversight reviews or studies, the Subcommittee on Labor Standards conducted by this legislation.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

With reference to the statement required by clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, no findings or recommendations of the Committee on Government Operations have been submitted to this Committee concerning the subject matter specifically addressed by H.R. 3530.

SECTION-BY-SECTION
ANALYSIS OF FAIR LABOR STANDARDS
AMENDMENTS OF 1985

SECTION 1. SHORT TITLE; REFERENCE TO ACT

Subsection (a) provides that the bill when enacted may be cited as the "Fair Labor Standards Amendments of 1985." Subsection (b) is a technical provision.

SECTION 2. COMPENSATORY TIME

Subsection (a) amends Section 7 of the Act adding a new subsection (o). New subsection 7(o)(1) provides

that as of April 15, 1986, employees of State and local governments may receive, in lieu of overtime compensation, compensatory time off at the rate of not less than 1.5 hours of compensatory time for each hour of overtime worked.

New subsection 7(o)(2) sets prerequisite conditions and limitations on the granting of compensatory time. (A) Compensatory time may only be offered pursuant to a collective bargaining agreement or other agreement or understanding between the employer and the employee or the employees' selected representative, or with prior notice to the employee, before the performance of the overtime work. (B) An employee may not accrue compensatory time in excess of the appropriate limit on accrued but unused compensatory time. Subsection 7(o)(2) also makes it clear that for employees hired before April 15, 1986 the employers' regular practice of providing compensatory time would constitute an agreement as long as it confirmed to the other requirements of these amendments.

New subsection 7(o)(3)(A) states that employees whose jobs include public safety, emergency response, or seasonal work may not accrue or bank compensatory time in excess of 480 hours. For all other employees the limitation would be set at 180 hours.

New subsection 7(o)(3)(B) provides that if accrued compensatory time is bought out, or cashed in, the compensation received would be at the employee's regular rate at the time of the payment.

New subsection 7(o)(4) states that upon termination an employee will be paid for any accrued but unused compensatory time at a rate not less than the average regular rate received by the employee during the previous three (3) years.

New subsection 7(o)(5) requires that an employee must be permitted by the public employer to use requested

compensatory time within a reasonable time after making a request unless the use of the compensatory time would unduly disrupt the operations of the public agency.

New subsection 7(o)(6) defines (A) overtime compensation and (B) compensatory time.

Subsection (b) provides that existing collective bargaining agreements providing for compensatory time for overtime worked will continue in effect except for modifications to bring the terms "compensatory time" in the provisions of the agreements into conformity with the time and one half rate and other requirements of these amendments.

Subsection (c) provides (1) that public employers will not be liable for overtime and related paperwork violations of the Act until April 15, 1986 for those "traditional" public employees affected by the *Garcia* decision, and (2) that public employers may defer until August 1, 1986 the payment of monetary overtime compensation for hours worked after April 15, 1986.

SECTION 3. SPECIAL DETAILS, OCCASIONAL OR SPORADIC EMPLOYMENT, AND SUBSTITUTION

Subsection (a) amends Section 7 of the Act by adding a new subsection (p).

Subsection 7(p)(1) provides that special detail work by a public safety employee at the employee's own option for a separate and independent employer shall not be counted as hours worked for the purpose of overtime pay by the employee's regular public employer.

Subsection (b) adds a new provision 7(p)2 providing that the hours worked by a public employee at the employee's option on an occasional or sporadic basis in a different capacity from the employee's regular employment shall not be counted by the employee's regular employer as hours worked purposes of overtime purposes.

Subsection (c) adds a new subsection 7(p)(3) allowing a public safety employee with the consent of the employee's employer to substitute for another employee without the substitution hours counting as hours worked for overtime purposes. It also eliminates the need for employers to keep records of substituted hours for overtime purposes.

SECTION 4. VOLUNTEERS

Subsection (a) amends section 3 of the Act adding a new paragraph (4) stating that an individual who volunteers to perform a service for a public agency shall not be considered an employee of that agency for purposes of the Act, providing he or she is volunteering his or her services for a different employer or in a different job for the same employer. A volunteer may be provided reasonable benefits, expenses, or a nominal fee or any combination thereof.

Subsection (b) instructs the Secretary of Labor to issue regulations on volunteers by March 15, 1986.

Subsection (c) provides that public employers will not be liable for possible minimum wage violations before April 15, 1986 with respect to service deemed by that agency to have been performed for it by a volunteer.

SECTION 5. STATE AND LOCAL LEGISLATIVE EMPLOYEES

This section amends section 3 of the Act to exempt employees of all state and local legislative bodies or branches except library employees.

SECTION 6. EFFECTIVE DATE

The amendments made by this bill will take effect on April 15, 1986 and the Secretary of Labor is required before that date to publish regulations to implement these amendments.

SECTION 7. EFFECT OF AMENDMENTS

This section makes it clear that the bill is neutral with respect to current litigation on the question of whether an employee, or any liability that would exist for violations of the Act regarding non-traditional employees.

SECTION 8. DISCRIMINATION

This section states that an employee who has been discriminated against by an employer because the employee asserted coverage under the overtime provisions of the Act since the *Garcia* decision *may seek relief under section* 15(a)(3) of the Act.

CHANGES MADE IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing laws made by the bill, and/or joint resolution, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in Italic, existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * *

DEFINITIONS

SEC. 3. As used in this Act—

(a) * * *

* * * *

(e)(1) Except as provided in paragraphs (2) [and (3)a], *(3), and (4)*, the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed ~~Forces~~, or

(v) the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, [or]

(IV) [who] is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office[.], *or*

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may not volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

* * * *

MAXIMUM HOURS

SEC. 7(a)(1) * * *

* * * *

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate govern-

mental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was

any other work, the employee engaged in such work may accrue not more than 180 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 180 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employer at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate not less than the average regular rate received by such employee during the last 3 years of the employee's employment.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the term "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours

worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public

agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who—

(A) is employed by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, and

(B) is employed in fire protection or law enforcement activities (including activities of security personnel in correctional institutions),

agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in such activities, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

• • • •

INVESTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

SEC. 11. (a) The Secretary of Labor or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Secretary shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the

Secretary shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of state labor laws, the Secretary of Labor may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such period of time, and shall make such reports therefrom to the Secretary as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder. *The employer of an employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.*

* * * *

APPENDIX G

Senate Report on the Fair Labor Standards Public Employee Overtime Compensation Act; October 17, 1985

Calendar No. 348

99th Congress
1st Session

Report
99-159

SENATE

FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT

OCTOBER 17, (legislative day, OCTOBER 15), 1985).—
Ordered to be printed

Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 1570]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended to pass.

CONTENTS

I. Committee Amendment as Reported

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Fair Labor Standards Public Employee Overtime Compensation Act".

SEC. 2. Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end thereof the following new subsection:

"(o)(1) Employees of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency may receive overtime compensation in the form of compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by subsection (a) of this section pursuant to—

"(A) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees; or

"(B) in the case of employees not covered by clause (A), an agreement or understanding arrived at between the employer and employee before the performance of the work.

"(2) In the case of employees described in clause (B) of paragraph (1) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (B).

"(3) In determining eligibility for overtime compensation under this section, compensatory time off taken during any workweek or work period shall not be counted as hours worked during that workweek or work period.

"(4)(A) No overtime compensation in the form of compensatory time off may be accrued by any employee of a public agency that is a State, a political subdivision of a State, or an interstate government agency, in excess of 480 hours for hours worked after April 15, 1986.

"(B) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, receive overtime compensation in accordance with subsection (a) of this section.

"(C) If any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency terminates employment with a particular public agency, the employee shall receive overtime compensation in accordance with the provisions of subsection (a) of this section.

"(D) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who—

"(i) has accrued compensatory time off, and

"(ii) has requested the use of such compensatory time off,

shall be permitted to use such compensatory time off within a reasonable period after the request, if the use of such compensatory time off does not unduly disrupt the operations of the public agency.

"(E) In making a determination under subparagraph (B) or (C) of this paragraph, the rate of compensation of the employee shall be the rate of compensation earned by the employee at the time the employee receives compensation for overtime.".

SEC. 3. Section 7 of the Fair Labor Standards Act of 1938 (as amended by section 2) is amended by adding at the end thereof the following new subsection:

"(p) In determining the hours of employment to which the rate prescribed by subsection (a) of this section applies, the hours worked by an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may be excluded by the agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section if—

"(1) the hours worked are solely at the employee's option; and

"(2) the hours are worked—

"(A) on an occasional or sporadic part-time basis for such public agency in a different capacity from the capacity in which the employee is primarily employed;

"(B) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), on a special detail for a separate and independent employer, if the public agency by whom the employee is employed requires that its fire protection or law enforcement personnel be hired by the separate and independent employer for the work, otherwise facilitates the employment, or affects the condition of employment of employees of the separate and independent employer, or

"(C) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), for another employee who was scheduled to work such hours if the employee's have agreed, with the approval of the employer, to substitute scheduled work hours.".

SEC. 4. Section 3(e) of the Fair Labor Standards Act of 1938 is amended—

(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and by inserting in lieu thereof "paragraphs (2), (3), and (4)"; and

(2) by adding at the end thereof the following new paragraph:

"(4)(A) The term 'employee' does not include any individual who is a volunteer for a public agency that is a State, a political subdivision of a State, or in an interstate governmental agency, even if the individual is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteer, except that an individual who is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services is not a volunteer for the purpose of this paragraph.

"(B) The hours in which an employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency performs services on a volunteer basis for a public agency, other than the

public agency which is the employee's employer, shall not be considered hours worked for the principal public agency for purposes of sections 6, 7, and 11 of this Act, even if the principal public agency has an agreement for mutual aid with the agency for which the employee volunteers.".

SEC. 5. Section 3(e)(2)(C)(ii) of the Fair Labor Standards Act of 1938 is amended—

(1) by striking out "or" at the end of division (III);

(2) by striking out "who" in division (IV);

(3) by striking out the period at the end of division (IV) and inserting in lieu thereof a comma and the word "or"; and

(4) by adding at the end thereof the following:

"(V) is an employee of the legislative branch or legislative body of a State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency."

SEC. 6. Notwithstanding the provisions of section 8, an employee of a public agency who asserts rights under the Fair Labor Standards Act of 1938 between February 19, 1985, and April 14, 1986, shall be accorded the same protection against discharge or discrimination as is available under section 15(a)(3) of the Fair Labor Standards Act of 1938.

SEC. 7. (a) The Secretary of Labor shall promulgate regulations to carry out paragraph (4) of section 3(e) of the Fair Labor Standards Act of 1938, as added by section 4 of this Act, by March 15, 1986.

(b) Prior to April 15, 1986, the practice of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency with respect to the

definition of volunteers shall, for the purpose of the amendment made by section 4 of this Act, be controlling.

SEC. 8. (a) Except as provided in subsections (b) and (c) of this section, the amendments made by this Act shall take effect on April 15, 1986.

(b)(1)(A) There shall be no liability under section 16 of the Fair Labor Standards Act of 1938 for any violation arising under sections 7 or 11(c) (as it relates to section 7) of the Fair Labor Standards Act of 1938 occurring prior to April 15, 1986, with respect to any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who would not have been covered by such Act under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions of States on January 1, 1985.

(B) With respect to any employee described in subparagraph (A) of this paragraph a public agency may defer until August 1, 1986 the payment of overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for overtime hours worked after April 14, 1986.

(2) This Act and the amendments made by this Act shall not affect whether a public agency that is a State, a political subdivision of a State, or an interstate governmental agency is liable under section 16 for a violation of section 6, 7, or 11 of the Fair Labor Standards Act of 1938 occurring prior to April 15, 1986 with respect to any employee of such public agency who would have been covered by the Fair Labor Standards Act of 1938 under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions of States on January 1, 1985.

(3) The amendments made by section 2 of this Act shall apply to any collective bargaining agreement, memorandum of understanding, or other agreement between

the public agency and recognized representative of such employees in effect on the date of enactment of this Act.

(c) The provisions of sections 6 and 7 shall take effect on the date of enactment of this Act.

Amend the title so as to read:

A bill to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes.

II. Summary of the Bill

I. The overtime provisions of the FLSA are modified to make comp time available in lieu of overtime pay for employees of state and local governments.

A. The bill allows employees the opportunity to receive overtime compensation in either of two forms.

B. The bill also allows employers the flexibility to negotiate for a comp time option.

C. The availability of this comp time is subject to certain conditions.

1. Comp time must be pursuant to an agreement between the employer and employee.

2. Comp time must be available at the premium rate of not less than 1½ hours for each hour of overtime worked.

3. An employee may bank up to 48 hours of comp time (i.e. 8 weeks—320 hours—of overtime worked).

4. An employee may use comp time within a reasonable period of requesting its use, so long as the employer's operation is not unduly disrupted.

5. An employee has the right to cash out comp time when leaving his or her job, at the rate of pay received when leaving.

II. The bill provides flexibility for public employers and employees in other areas.

A. Volunteers. A volunteer may receive a nominal fee or reasonable benefit without becoming a paid "employee".

B. Joint Employment. Employees may moonlight on special detail assignments (e.g. police working security at local rock concert) or occasional jobs (e.g. school bus driver refereeing school football games) without having hours counted toward overtime requirements.

III. Effective date: The bill is effective on April 15, 1986 (one year from the mandate in *Garcia*). This deferral enables state and local governments to achieve compliance.

III. Background and Need for Legislation

A. BACKGROUND

Congress enacted the Fair Labor Standards Act (FLSA) in 1938, establishing nationwide minimum wage and maximum hours standards for the first time. The FLSA proclaimed Congress' intent to ensure "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Over the years, the Act has been amended and expanded to include coverage of previously excluded groups of workers. The history of the FLSA as applied to state and local government employees involves a number of actions by Congress, the U.S. Department of Labor (DOL), and the U.S. Supreme Court since 1966.

Congressional action

The FLSA provides as a general matter that an employee who is not otherwise exempt from coverage shall be entitled to a federally prescribed minimum wage and to overtime pay on a time-and-one-half basis for all hours worked in excess of 40 in a workweek. It initially applied only to private employers who were directly engaged in

commerce. In 1966, Congress extended the FLSA to cover certain school, hospital, nursing home, and transit employees of state and local government under the Fair Labor Standards Amendments of 1966 (80 Stat. 830). In 1974, Congress further expanded the FLSA to cover all state and local government employees except for a small number who were specifically exempted, when it enacted the Fair Labor Standards Amendments of 1974 (88 Stat. 55). The 1974 amendments also extended coverage of the FLSA to a wide range of Federal employees, including civilian employees of the military departments, employees of agencies of the executive branch, and employees of the U.S. Postal Service. As a result of the 1974 FLSA amendments, the minimum wage provisions of the FLSA (29 U.S.C. 206), which currently require the payment of at least $3.35 per hour to employees, were extended to almost all employees of state and local governments. Similarly, the overtime provisions of the FLSA (29 U.S.C. 207), requiring the payment of overtime at not less than a time and one-half basis for hours worked in a workweek in excess of 40, were extended to these same state and local government employees.

The 1974 amendments included a limited overtime exception for police officers, firefighters, and related employees. (29 U.S.C. 207(k)). Congress established these special provisions in recognition of the special needs of governments in the area of public safety and the unusually long hours that public safety employees must spend on duty. Section 7(k) was intended to alleviate the impact of the FLSA on the fire protection and law enforcement activities of state and local government by providing for work periods of up to 28 days (instead of the usual seven-day workweek), establishing somewhat higher ceilings on the maximum number of hours which could be worked before overtime compensation had to be paid, and providing for a gradual phase-in period. By the end of the phase-in period, the maximum number of

hours for police officers and firefighters was to be the lesser of 216 or the average number of hours of work in tours of duty in work periods of 28 days as determined by DOL in a statutorily mandated study. In 1983, DOL published the final results of its study and established the new hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 Fed. Reg. 40,518).

Supreme Court

The 1966 FLSA amendments were challenged on constitutional grounds and upheld by the Supreme Court of *Maryland v. Wirtz*, 392 U.S. 183 (1968). The Supreme Court in *Wirtz* concluded that federal regulation of labor conditions in public schools and hospitals was constitutional under the Commerce Clause and did not unduly interfere with the performance of governmental functions entrusted to the States.

Shortly after enactment of the 1974 FLSA amendments, a number of cities and states challenged the validity of those amendments in Federal court. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court overruled *Wirtz* and held that both the 1966 and the 1974 amendments were unconstitutional to the extent that they interfered with the integral or traditional governmental functions of States and their political subdivisions. The Court reasoned in pertinent part:

> These activities [fire prevention, police protection, sanitation, public health, and parks and recreation] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the

> States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

426 U.S. at 851 (footnote and citations omitted)

Under *National League of Cities*, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation were held to be traditional functions of state and local government and, as such, exempt from the FLSA. On December 21, 1979, DOL issued final regulations defining traditional and nontraditional functions of state and local government for purposes of determining whether the FLSA was applicable. In its regulations, DOL added libraries and museums to the functions originally determined by the Supreme Court to be traditional (29 CFR 775.4). DOL defined local mass transit systems, along with seven other functions, as nontraditional (29 CFR 775.3).

A number of public transit authorities challenged the validity of the DOL determination that provision of local mass transit was a nontraditional governmental function. Ultimately, the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority* was presented with the question whether that DOL determination was a proper application of the *National League of Cities* doctrine. In 1984, following oral argument, the Court ordered reargument of the Garcia case on the question whether the constitutional principles established by *National League of Cities* should be reconsidered.

On February 19, 1985, the Supreme Court expressly overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985), and thereby left the FLSA fully applicable to state and local governments. Reasoning that it had "no license to employ freestanding conceptions

of state sovereignty when measuring Congressional authority under the Commerce clause," the Court described its previously promulgated 'traditional governmental function' test as 'doctrinally barren," and held that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1018, 1021.

After enumerating various instances where the states "have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause," the Court observed:

> The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

105 S.Ct. at 1020.

As a result of the *Garcia* ruling, states and localities are not subject to all FLSA requirements, including the 1971 and 212 maximum hours standard for law enforcement and fire protection employees respectively. On June 14, 1985, DOL announced its enforcement policy, stating that the "Wage and Hour Division will begin conducting FLSA investigations involving activities considered traditional government employment and involving employment in local governments" and "in all such cases will extend" the investigation period back to April 15, 1985. DOL selected April 15 as the effective date on which the Supreme Court's mandate issued in the *Garcia* case. DOL also announced that it would delay enforcement activities until October 15, 1985; this date later was extended to November 1, 1985.

NEED FOR THE BILL

In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into social desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FSLA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsbility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.

The Committee recognizes that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 1—are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet FLSA standards immediately under *Garcia*. Although many jurisdictions commendably and successfully have undertaken to do so, others have expressed an urgent need for lead-time in which to reorder their budgetary priorities while maintaining fiscal stability. As the Committee did under the 1974 amendments, it has again allowed for lead-time for state and local governmnets to comply with the FLSA requirements.

The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements —frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

IV. History of S. 1570

S. 1570, a bill to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the

application of that Act to volunteers, and for other purposes, was introduced by Senator Nickles on August 1, 1985 and was referred to the Committee on Labor and Human Resources. Subsequently, Senators Nickles and Metzenbaum agreed to an amendment in the nature of a substitute for the original bill. This amendment was accepted by the Committee on Labor and Human Resources on October 8, 1985.

V. Hearings

Public hearings were conducted by the Subcommittee on Labor on July 25 and September 10 in Washington, D.C. A field hearing was held in Oklahoma City, Oklahoma on August 28. The following individuals provided testimony.

JULY 25, 1985

Senator Pete Wilson; California

Congressman John E. Porter; Illinois

Governor John D. Ashcroft; Jefferson City, Missouri

Governor Richard D. Lamm; Denver, Colorado

Governor James G. Martin; Raleigh, North Carolina

Lt. Governor William P. Hobby, Jr.; Austin, Texas

George V. Voinovich, Mayor; Cleveland, Ohio, representing National League of Cities

John E. Bourne, Jr., Mayor; North Charleston, South Carolina, representing U.S. Conference of Mayors

James C. Thomas, President-elect; representing National Association of State Personnel Executives

Senator Joseph W. Harrison, Majority Leader, Indiana Senate; representing National Conference of State Legislatures

Al Bilik, Executive Director, State and Local Division; representing AFL-CIO

Peggy Connerton, Chief Economist; representing Service Employees International Union

Harold A. Schaitberger, Legislative Director; representing International Association of Fire Fighters

Paula Mac Ilwaine, James Hankla, Abraham Aiona; representing National Association of Counties

Frank H. Forbes, Jr.; representing National Public Employer Labor Relations Association/International City Management Association

Herbert R. Hern, President; representing Industrial Employers and Distributors Association

AUGUST 28, 1985

James Hopper, staff member; representing Senator David Boren (D-OK.)

John F. Cantrell, president; representing County Officers and Deputies Association of Oklahoma

Robert H. Gardner; Tulsa Police and Fire Commissioner

Randy Orndorph, president; representing Tulsa Fraternal Order of Police

Paul Abel, Sheriff, Pottawatomie County Sheriff's Department

Ivan Simmons, president; representing Association of County Commissioners of OK.

Rhonda Couch Swagerty, Tahlequah school bus driver

Steven A. Lewis, director, Oklahoma Department of Wildlife Conservation

Captain Larry Owen, administrative assistant to Commissioner Reed; representing Oklahoma Department of Public Safety

Steve Cain, treasurer; representing Fraternal Order of Police, Oklahoma City

Thomas A. Riddle, business agent; representing Professional Fire Fighters of OK.

Carl Weinaug, city manager of Stillwater, OK.

G. Craig Weinaug, city manager of Ardmore, OK.

Robert D. Allen, Oklahoma City Municipal Counselor

Roger F. Cutler, city attorney of Salt Lake City, Utah; representing National Institute of Municipal Law Officers

SEPTEMBER 10, 1985

William E. Brock, Secretary, U.S. Department of Labor

Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division; U.S. Department of Justice

Francis Flaherty, Mayor; Warwick, Rhode Island

Zoe E. Baird, Special Counsel; representing American Public Transit Association

Wayne M. Cook, General Manager, VIA Metropolitan Transit of San Antonio, Texas; representing American Public Transit Association

Elmer Dunaway, Chairman, National Labor Committee; representing Fraternal Order of Police

Edward J. Blaisie, president, Detectives Endowment Association; representing National Association of Police Organizations, Inc.

Michael D. Muth, Legislative Liaison; representing National Troopers Coalition

William C. Summers, Supervising Attorney; representing International Association of Chiefs of Police, Inc.

John B. Stewart, Jr., Chief, Hartford Fire Department; representing Internal Association of Fire Chiefs

James L. Roberts, Jr., Commissioner; Mississippi Department of Public Safety

Roy G. Saunders, President-elect; representing International Association of Auditorium Managers

VI. Committee Views

A. COMP TIME

A new subsection 7(o) is added to the FLSA to allow state and local government employees to be compensated for overtime hours with compensatory time off ("comp time") in lieu of monetary compensation. Hours for comp time granted in lieu of cash must be compensated at the premium rate of not less than one and one-half hours for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one half times the regular rate of pay.

1. Agreement or understanding

The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee. The agreement or understanding need not be in writing, but a record of its existence must be kept. An employer need not adopt the same method or procedure when reaching such agreement or understanding with different employees. The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and

voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of comp time so long as those provisions do not conflict with this subsection or the remainder of the Act.

In the case of employees who have no recognized representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding comp time in lieu of overtime pay shall be deemed to have reached an agreement or understanding with these employees as of April 15, 1986. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee employed prior to the effective date of this subsection. If, however, a regular practice of awarding comp time to employees without a recognized representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. Employers may initiate a regular practice of awarding comp time in lieu of overtime pay between the date of enactment and April 15, 1986, so long as that practice is a regular one and is not intended to avoid or undermine the provisions of this subsection.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations. An employee may accrue a maximum of 480 hours of comp time. (Hours accrued prior to April 15, 1986 do not count toward this limit). The 480 hour limit represents 320 hours of actual overtime worked times the one and one-half premium rate. Once this limit is reached, an employee either must be paid in cash for some of the accrued hours

or else must use some comp time before any additional overtime hours may be compensated in the form of time off. For example, if an employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue 30 hours at the premium rate. But if an employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 hours must be accrued before comp time may be used.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued comp time subject to this subsection. The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee leaves his job voluntarily (including retirement), is terminated by his employer, or dies. The rate of compensation for cashing out accrued comp time shall be the rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued comp time. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of comp time, that request should be honored unless to do

so would be unduly disruptive. By "unduly disruptive", the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

B. JOINT EMPLOYMENT

A new subsection 7(p) is added to the FLSA to address the area of joint employment. Under the FLSA joint employment rule, there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of his hours worked credited to one employer for purposes of determining overtime liability. The Committee preserves this FLSA protection so as to prevent such abuses as manipulation of job scheduling or rotation of workers to circumvent overtime requirements. At the same time, the Committee recognizes that there are exceptional circumstances for which special provision should be made, as discussed below.

1. Part-time employment in a different capacity

An employee of a state or local government may have the opportunity to work at his or her option on an occasional or sporadic basis in a different capacity from his or her primary employment. A city mail clerk may serve as a referee at a sports event sponsored by the same city. A county bus driver may assist in crowd control at an event such as a winter festival. The Committee does not intend to prohibit these types of practices, as they do not invite overtime abuse. Accordingly, the new subsection allows an employee to undertake such occasional and sporadic employment without regard to the Act's overtime requirements.

2. Special detail work

An employee engaged in public safety is at times offered opportunities to accept optional special detail work for a separate and independent employer on the employee's off-duty time. These special details include the police officer who accepts extra employment from a school board to direct traffic at a football game, or from a promoter to furnish crowd control at a rock concert or convention. Such opportunities may result from a local legal requirement promulgated by the governing body which is also the employee's primary employer. The requirement may specify that a separate and independent employer must hire sworn law enforcement personnel for these functions, pay such personnel through the primary employer's payroll system, or otherwise adjust or alter their ordinary working conditions. Under current FLSA regulations, the "joint employment" rule requires that the hours worked for the "joint employment" rule requires that the hours worked for the separate and independent employer be combined with the hours worked in the employee's primary job in the calculation of overtime. Under this subsection, the joint employment rule would not apply so long as (i) the special detail is worked solely at the employee's option; (ii) the two employers are in fact separate and independent; and (iii) the primary employer requires, facilitates or affects the performance of the work, as set forth in subsection 7(p)(2)(B). For example, a school system's employment of police officers to direct traffic at a football game where local ordinance requires that only sworn police officers be used for such duty and where the work is solely at the option of the police officers would qualify for separate treatment under this exception to the FLSA. By contrast, the assignment of special details of police officers to cover the extra load of police work required by a large convention where that assignment is not solely at the option of these officers would not qualify. This would be true even if the body

holding the convention reimburses the primary employer for the costs of these services.

3. Substitute work hours

Employees engaged in fire protection or law enforcement activities traditionally have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee. Current FLSA regulations may raise questions as to the propriety of such a practice. This new subsection would allow one employee in fire protection or law enforcement to substitute and work for another such employee if the substitution was (i) voluntarily undertaken and agreed to by the employees not at the employer's behest, and (ii) approved by the employer. If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule.

EMPLOYEES OF STATE AND LOCAL LEGISLATIVE BODIES

The exemption from the FLSA overtime provisions for employees of a state or local legislative body (section 3(E)(2)(C)(V) is intended to exempt these employees to the same extent as employees of Congress are exempted under section 3(e)(2)(A). Therefore, just as employees of the Library of Congress are not exempt from these provisions neither are employees of a state or local legislative library. Existing law provides a series of exemptions for state and local legislative employees, but questions have been raised as to whether these exemptions are as broad as the Congressional exemption. The purpose of the new provision is to clarify that this now is the case. The provision is not intended to exempt from FLSA overtime coverage employees of school districts or institutions of higher education.

DISCRIMINATION

Although the Act's overtime protections (including the new provisions described above) do not become effective for most state and local employees until April 15, 1986, many such employees asserted a claim to coverage under section 7 of the FLSA on or after February 19, 1985, the date of the *Garcia* decision. The Committee emphasizes that any action taken by public employers to discharge or in any other manner discriminate against employees because they have asserted such a claim is unlawful under section 15(a)(3) of the Act.

VOLUNTEER SERVICES

A new paragraph 3(e)(4) is added to the FLSA to make clear that persons performing volunteer services for state and local governments should not be regarded as "employees" under the statute. The Committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes. At the same time, the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to "volunteer."

To this end, the paragraph provides that an individual who performs services on a volunteer basis for a state or local government shall not be deemed an employee for FLSA purposes: even if the individual receives expenses, a nominal fee or reasonable benefits to perform the services. Thus, for example, a volunteer school crossing guard does not become an "employee" because he or she receives a uniform allowance and/or travel expenses. The one exception to this rule is that an individual who is employed by one public agency may not volunteer to provide the same type of services for the same public agency. To illustrate, a nurse employed by a state hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however perform such services as a volunteer at a county clinic.

The new paragraph further provides that a state or local government employee may perform volunteer services for another public agency without regard to FLSA overtime requirements, even if the two governmental entities have entered into a mutual aid agreement. Thus, where Town A and Town B have entered into a mutual aid agreement, a firefighter employed by Town A who also is a volunteer firefighter for Town B will not have his or her hours of service for Town B count as part of his or her employment with Town A.

The DOL is directed to issue regulations providing further guidance in this area. If, prior to April 15, 1986, a state or local government had a practice of treating certain individuals who performed services as volunteers, these individuals shall be consider volunteers rather than employees until April 15, 1986, for purposes of the FLSA.

EFFECTIVE DATE

The provision reaffirming the prohibition of discrimination against employees who have asserted a claim to coverage takes effect upon enactment. The amendments to section 7 (comp time and joint employment) and section 3 (volunteers and employees of state and local legislative bodies) take effect April 15, 1986 (except that DOL is to promulgate applicable regulations prior to that date). State and local government employers who are engaged in traditional functions as described by DOL at 29 CFR 775.2 and 775.4 (schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation, libraries, museums) are therefore exempt from FLSA overtime liability until April 15, 1986. The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities. Further, because many local governments begin their fiscal years in July, the amendments allow

actual payment of overtime compensation to be delayed until August 1, 1986 without penalty. Liability, however, in all instances will commence on April 15, 1986. The comp time provisions described above also become applicable to existing collective bargaining agreements on that date.

The April 1986 effective date is not intended to encourage public employers to postpone their efforts to comply with FLSA overtime provisions. To the contrary, the Committee lauds those jurisdictions that have taken—and continue to take—positive action to accord employees overtime protection consistent with the FLSA.

Finally, these amendments do not affect whether employees of state and local governments who are engaged in nontraditional functions as defined by the DOL at 29 CFR 775.3—notably local mass transit systems—are covered by the FLSA prior to April 15, 1986. The Committee is aware that the question whether transit employees, prior to the decision in *Garcia*, were entitled to FLSA compensation for overtime hours worked is still being litigated in federal court. The amendments are intended to protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.

VII. COST ESTIMATES

U. S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 15, 1985.

Hon. ORIN D. HATCH,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1570, the Fair Labor Standards Public Employee Overtime Compensation Act, as ordered reported by the Senate Committee on Labor and Human Resources, October 9, 1985. We estimate that this bill

would have no cost to the federal government, and would result in significant savings for state and local governments.

S. 1570 would amend the Fair Labor Standards Act (FLSA) as it now applies to nonfederal units of government. The bill would allow states and localities to grant employees one and one-half hours of compensatory time off for every hour of overtime worked, in lieu of paying cash premiums for overtime, but would require that employees receive cash compensation for overtime after accumulating 480 hours of compensatory time. Jurisdictions that maintain collective bargaining relationships would be allowed to preserve contract provisions that provide compensatory time for overtime. Public employees would be allowed to use accrued compensatory time within a reasonable amount of time.

S. 1570 would further amend the FLSA to exclude from the calculation of overtime occasional part-time or volunteer work by public employees for different agencies within the same jurisdiction or for a different jurisdiction. Persons working for nonfederal units of government on a voluntary basis and all persons employed by state and local legislative bodies, except employees subject to civil service laws and library personnel, would be exempt from coverage under the FLSA.

Finally, S. 1570 would set April 15, 1986 as the compliance date for applying the FLSA to state and local employees and would allow public employers to delay payments for overtime until August 1, 1986. Any FLSA liability that may exist prior to April 15, 1986 would be eliminated.

CBO estimates that no cost to the federal government would result from enactment of this legislation, because it would not significantly affect the amount of Department of Labor activity in enforcing the FLSA. CBO estimates, however, that S. 1570 would significantly reduce the budget impact of extending the FLSA to state and

local governments, as would be required under the recent Supreme Court decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority* (105 S. Ct. 1005, 1985).

CBO has not completed its study of the potential impact of the *Garcia* decision on state and local government budgets. Our preliminary analysis, based on information from over 30 states, communities, and concerned organizations, indicates that full application of the FLSA wage and overtime provisions as required by that decision would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include one-time costs that would be incurred to pay for compensatory time accrued after February 15, 1985.

We estimate that the bill would save most of these compliance costs, by delaying compliance with FLSA standards until April 1986, eliminating retroactive liability, and restoring the option of using compensatory time off rather than cash payments for overtime. The costs associated with the *Garcia* decision and the savings resulting from this bill are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the savings depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extent to which states or communities that are not yet complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employees who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways

to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. This factor and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Committee with further information as it becomes available.

With best wishes,

Sincerely,

ERIC HANUSHEK
(For Rudolph G. Penner, Director).

VIII. REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1570 is made.

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 1570 provides rules for compensatory time off in lieu of overtime compensation for certain public agency employees. All such employers and employees are currently covered by the FLSA. According to the U.S. Census Bureau, as of September 1984, there were approximately 13.5 million state and local employees. Of these, the Employment Standards Administration of the U.S. Department of Labor estimates that as of February 19, 1985, the date of the *Garcia* decision, 6.76 million of these state and local employees are subject to the overtime provisions of the FLSA.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The exact economic impact associated with this bill is not known. The legislation allows a public agency to give compensatory time off in lieu of overtime pay. If the public agency grants the time off, no additional costs are associated with the bill. On the other hand, if an employee cashes out his or her accrued overtime at termination, the rate of pay at the time of the cash-out is used rather than the rate of pay at the time the overtime is accrued. Thus, if an employee's rate of pay increases over this period of time, the cash-out will cost the employer more than if the money had been paid immediately. The Committee cannot estimate how the new flexibility given to public agencies will be used and thus cannot determine the exact economic impact.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

This legislation has no impact on personal privacy. Certain record-keeping requirements to calculate overtime hours already are required by FLSA. The changes made by this bill do not have any additional personal privacy implications.

D. ADDITIONAL PAPERWORK, TIME AND COSTS

FLSA requires that overtime must be paid as soon after the regular pay period, normally a seven day period, as is practical. The bill allows, under certain circumstances, for some overtime hours, up to a maximum of 480, to be carried forward without regard to the regular pay period. Thus, some overtime hours will remain on an employer's books for a longer period of time than now is the case. The additional paperwork, time and costs resulting from this longer carry-over period, however, are estimated to be minimal.

IX. Tabulation of Votes Cast in Committee

The motion favorably to report the bill as amended to the Senate was passed unanimously by the Committee.

X. Section-by-Section Analysis

Section 2 adds a new subsection 7(o) to the Fair Labor Standards Act. New section 7(o)(1) provides that employees of a state or local government may receive comp time in lieu of overtime pursuant to a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees or pusurant to an agreement or understanding between the employer and employee before the performance of the work.

New section 7(o)(2) provides that for employees hired prior to April 15, 1986, a regular practice of providing comp time in lieu of overtime that is in effect on April 15, 1986 shall constitute such agreement or understanding.

New section 7(o)(3) states that comp time taken during any work week or period shall not be counted as hours worked during that work week or period.

New section 7(o)(4) provides that overtime compensation in the form of comp time may not be accrued by any employee in excess of 480 hours for hours worked after April 15, 1986. If the accrued hours do exceed 480 hours, or if the employee terminates employment, such employee must receive overtime compensation in accordance with section 7(a) of the FLSA. Further, an employee who has accrued comp time and required its use shall be permitted such use within a reasonable period of time as long as such use does not unduly disrupt the public agency's operations. Finally, if an employee receives cash for any accrued comp time, the hourly rate for the determination of the amount of cash to be received shall be the hourly rate such employer is receiving on the date of the cash-out.

Section 3 adds a new section 7(p) to the FLSA. An exclusion from the hours worked by an employee is provided for three circumstances, each of which requires that the hours worked are solely at

[illegible]

time work for a public agency in a different capacity from the capacity in which the employee is primarily employed. Second, an employee engaged in fire protection or law enforcement activities may work on a special detail for a separate and independent employer without having such hours count toward overtime if certain conditions are met. Finally, employees engaged in fire protection or law enforcement activities may trade hours, if such employees agree and the employer approves.

Section 4 amends setcion 3(e) of the FLSA by adding a new paragraph (4) which excludes from the definition of the term "employee" any individual who is a volunteer for a public agency even if such individual is paid expenses, reasonable benefits, or a nomianl fee, unless such individual is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services. Further, the hours in which an employee of a public agency performs services on volunteer basis for a public agency other than the employee's employer shall not be considered as hours worked for FLSA purposes even if the employing public agency has an agreement for mutual aid with the agency for which the employee volunteers.

Section 5 amends section 3(e)(2)(C)(ii) of the FLSA and excludes from FLSA coverage an employee of the legislative branch or body of a state, political subdivision or agency, as long as such individual is not employed by the legislative library of such state, political subdivision, or agency.

Section 6 provides, that notwithstanding section 8, any employee of a public agency who asserts rights under the FLSA between February 19, 1985 and April 14, 1986

shall be accorded the same protections otherwise available under section 15(a)(3) of the FLSA.

Section 7 directs the Secretary of Labor, by March 15, 1986, to promulgate regulations on the new "volunteer" language added by section 4. Prior to such date, the practice of a public agency with respect to the definition of "volunteers" shall be controlling.

Section 8 contains the effective dates. The general rule in section 8(a) is that the effective date is April 15, 1986. Section 8(b)(1)(A) provides that there is no liability under section 16 of the FLSA for any violations arising under sections 7 or 11(c) of the FLSA occurring prior to April 15, 1986 for any employee of a public agency who would not have been covered by the FLSA under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions on January 14, 1986. Section 8(b)(1)(B) provides that cetrain public agencies may defer payment of overtime compensation until August 1, 1986 for overtime hours worked after April 14, 1986.

Section 8(b)(2) provides that this Act and the amendments made by this Act shall not affect whether a public agency is liable under section 16 for a violation of section 6, 7, or 11 of the FLSA occurring prior to April 15, 1986 with respect to any employee of such public agency who would have been covered by the FLSA under the special enforcement policy of the Secretary of Labor concerning states and political subdivisions on January 1, 1985.

Section 8(b)(3) provides that the amendments contained in section 2 shall apply to any collective bargaining agreement, memorandum of understanding, or other agreement between the public agency and recognized representative of such employees in effect on the date of enactment.

Section 8(c) provides that sections 6 and 7 shall take effect on the date of enactment.

XI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Fair Labor Standards Act of 1938

AN ACT To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

SEC. 2. * * *

DEFINITIONS

SEC. 3. As used in this Act

(a)(d) * * *

(e)(1) Except as provided in [paragraphs (2) and (3)] *paragraphs (2), (3), and (4)*, the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United Sttaes Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, **[**or**]**

(IV) **[**who**]** is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office **[**.**]**, *or*

(V) is an employee of the legislative branch or legislative body of a State,

political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (n), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who is a volunteer for a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, even if the individual is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, except that an individual who is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services is not a volunteer for the purpose of this paragraph.

(B) The hours in which an employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency performs services on a volunteer basis for a public agency, other than the public agency which is the employee's employer, shall not be considered hours worked for the principal public agency for purposes of sections 6, 7, and 11 of this Act, even if the principal public agency has an agreement for mutual aid with the agency for which the employee volunteers.

SECS. 5-6. * * *

MAXIMUM HOURS

SEC. 7.

(a)-(n) * * *

(o)(1) Employees of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency may receive overtime compensation in the form of compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by subsection (a) of this section pursuant to—

(A) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees; or

(B) in the case of employees not covered by clause (A), an agreement or understanding arrived at between the employer and employee before the performance of the work.

(2) In the case of employees described in clause (B) of paragraph (1) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (B).

(3) In determining eligibility for overtime compensation under this section, compensatory time off taken during any workweek or work period shall not be counted as hours worked during that workweek or work period.

(4)(A) No overtime compensation in the form of compensatory time off may be accrued by any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, in excess of 480 hours for hours worked after April 15, 1986.

(B) Any employee of a public agency that is a State, a political subdivision of a State, or an

interstate governmental agency who has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, receive overtime compensation in accordance with subsection (a) of this section.

(C) If any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency terminates employment with a particular public agency, the employee shall receive overtime compensation in accordance with the provisions of subsection (a) of this section.

(D) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who—

(i) has accrued compensatory time off, and

(ii) has requested the use of such compensatory time off,

(shall be permitted to use such compensatory time off within a reasonable period after the request, if the use of such compensatory time does not unduly disrupt the operations of the public agency.

(E) In making a determination under subparagraph (B) or (C) of this paragraph, the rate of compensation of the employee shall be the rate of compensation earned by the employee at the time the employee receives compensation for overtime.

(p) In determining the hours of employment to which the rate prescribed by subsection (a) of this section applies, the hours worked by an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental

agency, may be excluded by the agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section if—

(1) the hours worked are solely at the employee's option; and

(2) the hours are worked—

(A) on an occasional or sporadic part-time basis for such public agency in a different capacity from the capacity in which the employee is primarily employed;

(B) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), on a special detail for a separate and independent employer, if the public agency by whom the employee is employed requires that its fire protection or law enforcement personnel be hired by the separate and independent employer; or
separate and independent employer for the work, otherwise facilitates the employment, or affects the conditions of employment of employees of the separate and independent employer; or

(C) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), for another employee who was scheduled to work such hours if the employees have agreed, with the approval of the employer, to substitute scheduled work hours.

SECS. 8-19 * * *

APPENDIX H

Conference report on the Fair Labor Standards Amendments of 1985; November 1, 1985

99th Congress, 1st Session — HOUSE OF REPRESENTATIVES — Report 99-357

FAIR LABOR STANDARDS AMENDMENTS OF 1985

NOVEMBER 1, 1985.—Ordered to be printed

Mr. HAWKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1570]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

Short Title; Reference to Act

Section 1. (a) Short Title.—This Act may be cited as the "Fair Labor Standards Amendments of 1985".

(b) Reference to Act.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be a reference to a section or other provision of the Fair Labor Standards Act of 1938.

Compensatory Time

Sec. 2. (a) Compensatory Time.—Section 7 (29 U.S.C. 207) is amended by adding at the end the following:

"(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(2) A public agency may provide compensatory time under paragraph (1) only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

"(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed in paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

"(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

"(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

"(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

"(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

"(B) the final regular rate received by such employee,

whichever is higher.

"(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

"(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

"(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

"(6) For purposes of this subsection—

"(A) the term 'overtime compensation' means the compensation required by subsection (a), and

"(B) the terms 'compensatory time' and 'compensatory time off' mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate."

(b) Existing Collective Bargaining Agreements.—A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)).

(c) Liability and Deferred Payment.—(1) No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States),

7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

(2) A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 14, 1986.

Special Details, Occasional or Sporadic Employment, and Substitution

Sec. 3 (a) Special Detail Work for Fire Protection and Law Enforcement Employees.—Section 7 (29 U.S.C. 207) is amended by adding after subsection (o) (added by section 2) the following:

"(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

"(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail.

"(B) facilitates the employment of such employees by a separate and independent employer, or

"(C) otherwise affects the condition of employment of such employees by a separate tnd independent employer.".

(b) Occasional or Sporadic Employment.—Section 7(p) (29 U.S.C. 207), as added by subsection (a), is amended by adding at the end the following:

"(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.".

(c) Substitution.—(1) Section 7(p) (29 U.S.C. 207), as amended by subsection (b), is amended by adding at the end the following:

"(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.".

(2) Section 11(c) (29 U.S.C. 211(c)) is amended by adding at the end the following: "The employer of an

employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.".

Volunteers

Sec. 4. (a) Definition.—Section 3(e) (29 U.S.C. 203(e)) is amended—

"(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and inserting in lieu thereof "paragraphs (2), (3), and (4)", and

(2) by adding at the end the following:

"(4)(A) The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

"(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

"(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.".

(b) Regulations.—Not later than March 15, 1986, the Secretary of Labor shall issue regulations to carry out paragraph (4) of section (3)(e) (as amended by subsection (a) of this section).

(c) Current Practice.—If, before April 15, 1986, the practice of a public agency was to treat certain individuals as volunteers, such individuals shall until April 15, 1986,

be considered, for purposes of the Fair Labor Standards Act of 1938, as volunteers and not as employees. No public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall be liable for a violation of section 6 occurring before April 15, 1986, with respect to services deemed by that agency to have been performed for it by an individual on a voluntary basis.

State and Local Legislative Employees

Sec. 5. Clause (ii) of section 3(e)(2)(C)) (29 U.S.C. 203(e)(2)(C)) is amended—

(1) by striking out "or" at the end of subclause (III),

(2) by striking out "who" in subclause (IV),

(3) by striking out the period at the end of subclause (IV) and inserting in lieu thereof ", or", and

(4) by adding after subclause (IV) the following:

"(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.".

Effective Date

Sec. 6. The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

Effect of Amendments

Sec. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7, or 11 of such Act occurring before April 15, 1986, with respect to

any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

Discrimination

Sec. 8. A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act.

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill and agree to the same.

AUGUSTUS F. HAWKINS,
AUSTIN J. MURPHY,
W.L. CLAY,
PAT WILLIAMS
JAMES M. JEFFORDS,
TOM PETRI,
STEVE BARTLETT,
Managers on the Part of the House.

ORRIN G. HATCH,
DON NICKLES,
ROBERT T. STAFFORD,
HOWARD M. METZENBAUM,
EDWARD M. KENNEDY,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

PAYMENT FOR COMPENSATORY TIME UPON TERMINATION OF EMPLOYMENT

The Senate bill provides that upon termination of employment an employee shall be paid for unused compensatory time at the final regular rate received by such employee.

The House amendment provided that payment for unused compensatory time is to be at a rate not less than the average regular rate received by an employee during the last 3 years of the employee's employment.

The conference substitute combines the Senate and House provisions to provide that payment for unused compensatory time is to be at a rate not less than—

(1) the average regular rate received by an employee during the last 3 years of the employee's employment, or

(2) the final regular rate received by an employee, whichever is higher.

SCOPE OF SUBSTITUTION RULE

Under the Senate bill the rules for the treatment of hours of substitute employment apply to employees of a public agency engaged in the same activity.

Under the House amendment the rules for the treatment of hours of substitute employment apply only to employees engaged in fire protection or law enforcement activities (including activities of security personnel in correctional institutions).

The conference substitute is the same as the Senate bill.

COMPENSATORY TIME LIMIT

Under the Senate bill an employee may not accrue more than 480 hours of compensatory time.

Under the House amendment if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work may accrue not more than 180 hours of compensatory time.

The conference substitute provides that if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work

may accrue not more than 240 hours of compensatory time.

SCOPE OF PROTECTION AGAINST DISCRIMINATION

The Senate bill prohibits discrimination as defined by section 15(a)(3) of the Fair Labor Standards Act of 1938.

The House amendment prohibits discrimination with respect to wages or other terms or conditions of employment.

The conference substitute adopts the House amendment with the following understandings as to the scope of protection provided by the House amendment:

The antidiscrimination provision is meant to apply where one or more employees are singled out for adverse treatment in retaliation for an assertion that they are covered by the overtime provisions of the FLSA. The provision also is intended to apply where an employer's response to the assertion of FLSA coverage is to reduce wages or other monetary benefits for an entire unit of employees. In either instance, the actual victims of discrimination must show that coverage was asserted and they also must show actual discrimination, i.e., that the employer's action constituted retaliation for the employee or employees' assertion of coverage and avoidance of the asserted protections of Federal law. If a court so finds, that conduct would be unlawful under section 8.

An employer's adjustment of work schedules to reduce overtime hours would not constitute discrimination under this provision so long as it was not undertaken to retaliate for an assertion of coverage. Such an adjustment is permissible under the Act but it does not supersede applicable requirements of State law or a collective bargaining agreement.

An employer who, after February 19, 1985, paid cash overtime at a time and one-half rate pursuant to the

FLSA may not recoup these overtime payments from his employees by whatever means without violating section 8. State and local government employers are in no way obligated to comply with the Act's overtime provisions prior to April 15, 1986. But as stated in both Committee reports, nothing in this legislation, particularly the deferred effective date, is intended to encourage employers to postpone efforts to comply with the Act. Permitting employers who have voluntarily complied prior to April 1986 to negate their past compliance effort at some future date by recapturing from their employees payments already made would have precisely the effect that we intended to foreclose. Such permission also would allow unscrupulous employers to use the threat of recoupment to pressure or otherwise manipulate employees. Section 8 was meant to prohibit such retributive action.

A unilateral reduction of regular pay or fringe benefits that is intended to nullify this legislative application of overtime compensation to State and local government employees is unlawful. Any other conclusion would in effect invite public employers to reduce regular rates of pay shortly after the date of enactment so as to negate the premium compensation mandated by this legislation. The compensatory time and deferred effective date provision of these amendments are to relieve the economic impact of having to comply with the FLSA's premium rate requirements for overtime. Having provided for this relief, we agreed to preserve the same premium rate requirement that has been a part of the FLSA for nearly 50 years. We did not, at the same time, authorize employers to undermine that premium rate with impunity. In what we view as analogous circumstances, DOL regulations explicitly condemn employer efforts to adjust or recalculate regular rates of pay so as to evade the overtime requirements of the Act. (29 CFR 778.500).

This provision is not intended to prohibit State or local government employers from adjusting rates of pay

at some later point in response to fiscal concerns not directly attributable to the impact of extending FLSA coverage to their employees.

This provision is intended to remain neutral with respect to any action by employees challenging the lawfulness of an employer's unilateral reduction of regular pay or fringe benefits instituted prior to enactment of these amendments.

TIME LIMIT ON PROTECTION AGAINST DISCRIMINATION

Section 8 of the Senate bill limits the protection against discrimination to the period February 19, 1985, through April 15, 1986.

Under section 8 of the House amendment the protection against discrimination is limited to on or after February 19, 1985.

The conference substitute is the same as the House amendment with one modification. After August 1, 1986, an employee must assert coverage pursuant to section 15(a)(3) of the Act in order to be entitled to the protection against discrimination provided by the House amendment.

LIABILITY OF TERRITORIES AND POSSESSIONS FOR VIOLATIONS OF SECTION 6

Under the Senate bill and the House amendment public agencies are shielded from liability for violations of section 7 of the FLSA which occur before the effective date, April 15, 1986. The conference substitute provides the same shield with regard to violations of section 6 of the FLSA for territories and possessions of the United States.

AUGUSTUS F. HAWKINS,
AUSTIN J. MURPHY,
W.L. CLAY,
PAT WILLIAMS,
JAMES M. JEFFORDS,
TOM PETRI,
STEVE BARTLETT,
Managers on the Part of the House.

ORRIN G. HATCH,
DON NICKLES,
ROBERT T. STAFFORD,
HOWARD M. METZENBAUM,
EDWARD M. KENNEDY,
Managers on the Part of the Senate.

APPENDIX I

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
9-34BA Rayburn House Office Building
Washington, D.C. 20515

SUBCOMMITTEE ON LABOR STANDARDS

September 26, 1986

Honorable William E. Brock
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Mr. Secretary:

As primary sponsors and conferees on the Fair Labor Standards Amendments of 1985 (PL 99-150), we are very interested in the implementation and administration of those amendments. We believe that proper implementation of the amendments is essential to state and local governmental operations and public employees generally. During consideration of the amendments, the Congress was able to achieve a compromise on state and local government Fair Labor Standards Act (FLSA) provisions of the amendments that was fully supported by both public sector management and labor. It is important that this careful balance of labor and management support be preserved during the development and implementation of the Department of Labor (DOL) regulations currently under consideration.

The DOL published proposed regulations pursuant to the amendment on April 18, 1986 in *Federal Register* No. 75 (29 CFR Part 553). We understand that the Department is currently reviewing the comments received in response to the proposed regulations, and may be issuing final regulations in the near future. In these

circumstances, we are particularly concerned about an issue that has come to our attention and we feel merits your attention.

Section 2 of the 1985 Amendments provides that state and local governments may use compensatory time in lieu of cash payment for overtime only after certain conditions are met. Among those conditions is the agreement of representatives of the employees involved where such employees have designated a representative. (See FLSA Section 7(o)(2)(A)(i), as added by Section 2(a) of the 1985 Amendments.) We were careful in developing the amendment to be clear that the representative need not be a formally recognized collective bargaining representative and that recognition by the employer was not required. Section 553.23(b) of the proposed regulations also is clear, stating that:

> "In the absence of a collective bargaining agreement applicable to the employees, the representative need not be at formal or recognized bargaining agent as long as the representative is designated by the employees."

It is the employees' designation, and not the employer's recognition or attitude toward that representative, that is vital. FLSA Section 7(o)(2)(A)(i) was specifically drafted to avoid any requirement of formal recognition. During the consideration of the legislation, specific references were made to a number of states where NLRA collective bargaining style recognition does not exist; but where large numbers of fire, police, and general public employees belong to labor organizations. We intended the FLSA requirement of an agreement on compensatory time to apply in those situations.

Finally, we understand that some employers or employer representatives may have suggested that the final paragraph following the new FLSA Section 7(o)(2)(B) was intended to provide that the Section (A)(i) requirement of an agreement with the employee representative is not applicable to situations where a regular compensa-

tory time practice was in effect on April 15, 1986. As is clear from the express language of that paragraph, the rule with regard to practices in effect on April 15, 1986, applies *only* to Section (A)(ii) situations in which no representative is involved.

The current proposed regulations properly reflect the language and intent of the new law. If the Department knows of any situation in which employers have asserted that compensatory time is legal without an agreement with a designated employee representative, even where such a representative has requested an opportunity to meet, discuss and agree to the terms of a compensatory time system, the regulations should clearly state that such assertions are inconsistent with the law.

Very truly yours,

/s/ Austin J. Murphy
AUSTIN J. MURPHY
Chairman
Subcommittee on Labor Standards

/s/ Augustus F. Hawkins
AUGUSTUS F. HAWKINS
Chairman
Committee on Education and Labor

/s/ Jim Jeffords
JAMES M. JEFFORDS
Ranking Minority Member
Committee on Education and Labor

/s/ Bill Clay
WILLIAM L. CLAY
Majority Member
Subcommittee on Labor Standards

/s/ Pat Williams
PAT WILLIAMS
Majority Member
Subcommittee on Labor Standards

/s/ Howard M. Metzenbaum
HOWARD METZENBAUM
Ranking Minority Member
Subcommittee on Labor

/s/ Edward M. Kennedy
EDWARD M. KENNEDY
Ranking Minority Member
Committee on Labor and Human Resources

/s/ Robert T. Stafford
ROBERT T. STAFFORD
Ranking Majority Member
Committee on Labor and Human Resources

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-2388

MARVIN O. WILSON, JR., JOHN A. AUTEN, III, TERRY L. AUSTIN, PHILLIP A. JOHNSTON, WENDELL M. JOLLY, JR., SEBRON L. THOMPSON, HARVEY W. JAMES, JR., ROBERT L. HONEYCUTT, HOWARD DARRELL KEY, THOMAS RICHARD CRAFT, STEVEN L. RIDGE, OSCAR WILLIAM WHITE, BILLY WAYNE OLIVER, HARRY A. ROGERS, DICK NEWHOUSE, TOMMY R. WILBURN, CHARLES E. MELTON, LARRY G. METTS, CLAY E. MORRIS, TRAC L. MORRIS, DAVID G. CHARLES, JOHN A. AUTEN, IV, DAVID J. BLACK, E.E. CHRISTENBURY, CHARLES ALEXANDER ROSEBUROUGH, CARVIE E. WOODARD, GEORGE LEE WHITE, K.R. BLAKE, S.D. SPEAKS, J.M. CLAMPITT, WILLIAM T. HONEYCUTT, BARRY L. BOYD, DARRELL E. FURR, JEROME MARTIN FREDERICK, JAMES C. GEER, J.L. NEWELL, PHILLIP E. CHILES, BEN RAY NORWOOD, THERESA R. ALEXANDER, WARD S. HOWIE, FRANK E. REID, MICHAEL T. CARLETON, CONNIE WILLIAM MORGAN, WILLIAM A. STRAIN, MICHAEL J. CORIGLIANO, MELVIN D. BALLES, SCOTT A. DAWKINS, DAVID LEE NEWELL, MICHAEL SPATH, WILLIAM F. LOWE, T.A. MCKENZIE, DONALD W. TAYLOR, GARY LEE ISENHOUR, FRANK S. PRESSLEY, WILLIAM D. HENDERSON, DANNY JACK PHARR, DAVID EUGENE SCOTT, TOM C. HARLLEE, PATRICK F. STARNES, CLIFTON M. MULLIS, VINCENT T. SEVERN, DAVID K. LEDBETTER, FREDERICK O. SMITH, JERRY A. RODGERS, WILLIAM F. FREEMAN, ELI J. ROBLES, JAMES F. ELLIS, D.L. GHORLEY, D.C. NANCE, L.E. BLACK, J.C. BLACK, D.W. STEPHENS, C.D. GASKIN, J.D. BAREFOOT, D.C. MOORE, CHRISTOPHER D. GORDON, JAMES ROBERT SHAFFNER, GARRY E. MCCORMICK, RICHARD L. ALBAUGH, MICHAEL E. SAYE, ROBERT W.

McDONALD, RONALD LEON SHUMAKER, LEVI V. STEELE, DOYLE NEAL, FRED B. ARCHIE, DARRELL R. COLLINS, JACKIE C. CRESS, WILLIAM R. BROWN, SR., JEFFREY L. CAMPBELL, THOMAS A. DAVIS, RANDY P. MOWREY, J. MICHAEL KEFFER, CALVIN L. FINK, JOHN A. HAWLEY, JR., PHYLLIS S. BOST, WILLIAM R. SUMMEY, GEORGE BAXTER HOLMES, JAMES GREG TAYLOR, ROBERT WILLIAM KENNARD, GARY WAYNE WORKMAN, REX DONALD HOVEY, WILLIAM MICHAEL STEGALL, DONALD PARKS POPLIN, JAMES DAVID THOMAS, JAMES LOUIS BRADFORD, RONALD LEE SMITH, JERRY LYNN SHOPE, JERRY W. KILLIAN, BLAIR D. CARR, II, ANDREW PRESTON OSBORNE, SUE N. TARANTINO, R.L. PHARR, GARY MILLER, ROY KENNETH BRADLEY, ALLEN KEITH MIDDLETON, THOMAS WAYNE HELMS, LARRY MALBOURNE KEPLEY, JR., ROBERT J. BRISHEY, JOHNNY E. WILEY, LINDSAY D. KEITH, EDWARD WAYNE MURRAY, WALTER CLINTON CALDWELL, JR., SHARON BEAL BLACK, HOMER LARRY HOLTZCLAW, WILLIAM DUNCAN LOVE, VAN W. SULLIVAN, EVERETTE A. PASSALY, JR., CHARLES E. JARRELL, BARRY L. BROWN, WILLIAM B. COCHRAN, NATHAN DOUGLAS HOOKS, GRAYLEN D. HARE, STEPHEN S. BROTHERTON, TOMMY CURTIS LINK, CORNICE ALTON BUTLER, EDWARD ROGERS FUNDERBURK, JACK TIMOTHY GETTIS, ANTHONY DWAYNE MCWHIRTER, EUGENE PERRY FORTE, BOBBY W. DAVIS, KENNETH D. CRUMP, WALTER RANDY KINSEY, ALAN S. HOFFMAN, GEORGE RICHARD PARSLEY, DONALD CECIL MULL, ROY STUART SMITH, III, ANDREW REID PICKENS, ALFRED ALLEN DAVIS, JASON WILLIAM BOYD, JOHN LEE CAROTHERS, MOSES DAVID, RAYMOND HUGH THROWER, FRANKIE WAYNE GREER, DAVID ROE LANE, JR., LYNN CHANDLER, FRANCIS MARION MCGOWAN,

Plaintiffs-Appellees,

v.

CITY OF CHARLOTTE, NC,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte

Robert D. Potter, District Judge

(CA-88-79-C-C-P)

Argued: December 3, 1991

Decided: May 8, 1992*

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, WILKINSON, WILKINS, NIEMEYER, HAMILTON and LUTTIG, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkins wrote the majority opinion, in which Judges Russell, Widener, Wilkinson, Niemeyer, and Hamilton joined. Judge Luttig wrote a concurring opinion. Chief Judge Ervin wrote a dissenting opinion, in which Judges Hall, Phillips, Murnaghan, and Sprouse joined.

COUNSEL

ARGUED: Freeman Douglas Canty, OFFICE OF THE CITY ATTORNEY, Charlotte, North Carolina, for Appellant. Thomas Aquinas Woodley, MULHOLLAND & HICKEY, Washington, D.C., for Appellees. *ON BRIEF:* Gregory K. McGillivary, MULHOLLAND & HICKEY, Washington, D.C., for Appellees.

OPINION

WILKINS, Circuit Judge:

The City of Charlotte appeals the order of the district court granting summary judgment in favor of 156 in-

---

* The opinion originally filed May 8, 1992, has been changed only by insertion of the correct version of Chief Judge Ervin's dissenting opinion.

dividual Charlotte fire fighters (collectively, the "Fire Fighters") on their claim that the City violated section 7(o) of the Fair Labor Standards Act, 29 U.S.C.A. § 207(o) (West Supp. 1991). After oral argument before a panel, rehearing was ordered before this court sitting en banc. We now reverse the grant of summary judgment.

I.

Appellee Marvin O. Wilson, Jr., president of the Charlotte Fire Fighters Association Local 660, dispatched a letter dated December 3, 1985 to Fire Chief R. L. Blackwelder challenging the City's practice of awarding Fire Fighters compensatory time instead of cash payment for overtime hours worked. In his letter, Wilson referred to recently enacted amendments to the Fair Labor Standards Act and asserted that under newly added section 7(o) the City could not provide compensatory time in lieu of cash payment for overtime without first reaching an agreement with the representative of the Fire Fighters. He notified Chief Blackwelder that he and 155 other Fire Fighters had selected Local 660 of the International Association of Fire Fighters as their representative under subsection 7(o)(2)(A)(i) and that, absent an appropriate agreement under this section, the City was required to pay cash for all overtime work. Chief Blackwelder refused to bargain with Local 660 because North Carolina law prohibited contracts between governmental units and labor unions. The Fire Fighters instituted this action in February 1988, claiming that the compensatory time policy violated section 7(o) of the Act because the City refused to recognize and negotiate with Local 660 as the Fire Fighters' designated representative. They sought a monetary award in the form of liquidated damages equal to their accrued unpaid compensation for overtime. Granting the Fire Fighters' motion for partial summary judgment, the district court held that the City was obligated to enter into an agreement with the Fire Fighters'

designated representative in order to provide compensatory time.

II.

As originally enacted, the Fair Labor Standards Act was not applicable to state or local public employers. Although Congress attempted to subject state and local governmental employers to the minimum wage and overtime requirements of the Act, the Supreme Court held that these requirements were not enforceable against public employers when traditional governmental functions were involved. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities* and held that employees of a municipal transit authority were entitled to the protection afforded by the minimum wage and overtime requirements of the Act. *Id.* at 554-57.

In response to the *Garcia* decision, Congress amended provisions of the Act applicable to state and local public agencies in order to align the statutory scheme with the recent decision and to prevent undue hardship to public employers resulting from the financial burden of paying cash overtime compensation to public employees. *See* S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655. These amendments included the addition of section 7(o) that provides in pertinent part:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . .

(B) . . . .

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

29 U.S.C.A. § 207(o).

Following the addition of section 7(o) to the Act, a public employer who wishes to provide compensatory time off in lieu of monetary compensation for overtime work to its employees has several courses of action available. Pursuant to subsection 7(o)(2)(A)(i), it may reach an agreement with a representative of its employees. 29 U.S.C.A. § 207(o)(2)(A)(i). If an agreement is not reached with the employees' representative, a public employer may enter into an agreement with individual employees. 29 U.S.C.A. § 207(o)(2)(A)(ii); *Dillard v. Harris*, 885 F.2d 1549, 1552 (11th Cir. 1989) (finding that, within the meaning of subsection (ii), employees are not "covered by" subsection (i) unless an agreement

has been reached with the employees' representative), *cert. denied*, 111 S. Ct. 210 (1990); *but see International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814 (10th Cir. 1989) (holding public agency may not reach agreement with individual employees if those employees have designated a representative). In the absence of an agreement, and subject to the exception for employees hired prior to April 15, 1986, the Act mandates that a public employer compensate its employees for overtime work with monetary payments. 29 U.S.C.A. § 207(o); *Dillard*, 885 F.2d at 1556.

As noted above, the Act affords an exception to its general provision that the public agency must compensate its employees with cash for overtime work unless an agreement for compensatory time has been reached. *See* 29 U.S.C.A. § 207(o)(2)(B). For "employees not covered by subclause (i)," 29 U.S.C.A. § 207(o)(2)(A)(ii), who were "hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii)," 29 U.S.C.A. § 207(o)(2)(B). Thus, in the absence of an agreement under subsection 7(o)(2)(A)(i), with regard to employees hired prior to April 15, 1986, the regular practice with respect to overtime compensation in effect on that date is deemed to be an agreement under subsection 7(o)(2)(A)(ii).

Turning to the present controversy, it is undisputed that no agreement was reached between the City and the Fire Fighters or their representative and that the Fire Fighters were hired prior to April 15, 1986.[1] Additionally, it is clear that the regular practice in effect on

[1] After April 15, 1986, the City has required all new employees to read and sign a statement acceding to its policy of granting compensatory time instead of cash for overtime.

that date was for the City to award and the employees to accept compensatory time in lieu of cash payment for overtime work. While Wilson's letter to Chief Blackwelder may have expressed the employees' dissatisfaction with the practice, it did not negate the existence of the regular practice, one that continued after the letter was written. We conclude, therefore, that this regular practice "constitute[d] an agreement or understanding under such clause (A)(ii)." 29 U.S.C.A. § 207(o)(2)(B); *see also Dillard*, 885 F.2d at 1553.

III.

Noting that the letter from Wilson to Chief Blackwelder was written prior to April 15, 1986, the Fire Fighters contend that because a representative had been designated prior to this date the City may not unilaterally elect to continue the regular practice of providing compensatory time in lieu of cash. The Fire Fighters first suggest that *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990), is controlling and assert that it holds that if a public employer refuses to recognize the employees' designated representative the employer is required to allow each employee the choice of compensatory time or cash. Second, the Fire Fighters contend that a Department of Labor regulation precludes reliance by the City on the practice in place prior to April 15, 1986.

The Fire Fighters misread *Abbott*. In *Abbott*, as in this case, the city refused to entertain negotiations with the union representative on the basis that state law prohibited a public entity from engaging in collective bargaining. We held that subsection 7(o)(2)(A)(ii) permitted a public employer to offer its employees a choice between compensatory time or cash for overtime. 879 F.2d at 137. *Abbott*, however, does not mandate that when a subsection 7(o)(2)(A)(i) agreement is not reached, a subsection (ii) agreement with individual em-

ployees *must* be reached. Indeed, nothing in *Abbott*, or in section 7(o), can be read to require that the parties reach an agreement.

The Department of Labor regulation on which the Fire Fighters rely provides in part:

> No agreement or understanding is required with respect to employees hired prior to April 15, 1986, *who do not have a representative*, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

29 C.F.R. § 553.23(a)(1) (1991) (emphasis added). The Fire Fighters contend that because they had designated Local 660 as their representative prior to April 15, 1986, the City may not rely upon the regular practice in effect on that date. We assume, without deciding, that this regulation is a proper exercise of the Secretary's authority because on the facts presented by this appeal, the regulation does not mandate that the Fire Fighters prevail.[2]

In adopting this regulation, the Department of Labor acknowledged that public employers in some states would be prohibited from recognizing and negotiating with certain employee representatives. *See Dillard*, 885 F.2d at 1556. Consequently, the Department expressed its "intention that the question of whether employees have a representative . . . shall be determined in accordance

---

[2] Because we find that the Fire Fighters did not have a representative within the meaning of the regulation, we need not, indeed should not, resolve the hypothetical question of the proper interpretation of the regulations if they had had a representative. Similarly, our disposition of this question negates the necessity of considering whether the regulation constitutes a valid exercise of the authority of the Secretary. We, therefore, decline to express an opinion on these issues. Contrary to the suggestion of the concurring opinion, our decision to decline to resolve these issues is driven by a desire to adhere to our view of the proper scope of appellate review.

with State or local law and practices.'" *Abbott*, 879 F.2d at 136 (quoting 52 Fed. Reg. 2012, 2014-15 (Jan. 16, 1987)). Because Local 660 was not a representative whom the City could recognize consistently with state law, *see* N.C. Gen. Stat. § 95-98 (1989), the Fire Fighters did not have a representative within the meaning of the regulation and, therefore, are not assisted by 29 C.F.R. § 553.23(a)(1).[3] *See Dillard*, 885 F.2d at 1556.

IV.

In sum, in order to determine if the City properly continued to provide compensatory time off in lieu of monetary compensatory for the Fire Fighters, we are first called upon to decide whether the Fire Fighters have entered into an agreement with the City under either subsection (i) or (ii). No "collective bargaining agreement, memorandum of understanding, or any other agreement" was reached, nor have individual agreements with the employees been struck. However, because the Fire Fighters are not covered by subsection (i); because they were hired prior to April 15, 1986; and because the regular practice prior to that date was to award compensatory time for overtime work, that practice is deemed to constitute an agreement under subsection (ii). Consequently, by virtue of this statutorily imposed agreement, the City may continue to provide compensatory time for overtime work.

REVERSED AND REMANDED

---

[3] The Fire Fighters' reliance on other portions of 29 C.F.R. § 553.23 is similarly foreclosed because they did not have a representative within the meaning of the regulation.

LUTTIG, Circuit Judge, concurring in part and concurring in the judgment in part:

I join parts I, II, and IV of the court's opinion, but concur in only the result reached in part III.

I.

I agree with the holding of the court in part II of its opinion that, under section 7(o) of the Fair Labor Standards Act, 29 U.S.C. § 207(o), whether the City of Charlotte may provide the Fire Fighters compensatory time in lieu of cash payment for overtime hours worked depends *solely* upon whether there is an agreement that provides for compensatory time payments. *See Dillard* v. *Harris*, 885 F.2d 1549, 1554 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990). The court properly refuses to rest its decision in part II on whether appellees have a designated representative to negotiate with the City over compensation or on whether state law prohibits collective bargaining. Whether there is an employee representative and whether state law prohibits collective bargaining are, under the statute and the court's holding today, simply irrelevant. Section 7(o) distinguishes only between employees covered by agreements and those not covered by agreements, not between represented and unrepresented employees. If there is an agreement of a kind specified in either subsection (2)(A)(i) or subsection (2)(A)(ii), compensatory time may be provided; if there is no such agreement, regardless of the reason, the public employer is forbidden to award compensatory time for overtime hours worked.

The Fire Fighters and the dissent argue that a public agency is required by subsection (2)(A)(i) to negotiate with an employee-chosen representative and that the agency is prohibited from negotiating individual agreements under subsection (2)(A)(ii) if a representative has been selected by the employees. *See Nevada Highway Patrol Ass'n* v. *Nevada*, 899 F.2d 1549, 1553 (9th Cir.

1990); *International Ass'n of Fire Fighters, Local 2203* v. *West Adams County Fire Protection Dist.*, 877 F.2d 814, 818-20 (10th Cir. 1989).[1] The majority again correctly declines to engraft onto subsection 2(A)(i) an affirmative requirement to negotiate in absence of congressional direction and rejects as unsupported by the statute's language the contention that individual agreements with employees are prohibited if the employees have selected a representative.

The dissent, notably, does not even contend that section 7(o) itself imposes a requirement that the public agency reach an agreement with a designated employee representative as a precondition to the award of compensatory time to represented employees; its only argument is that the legislative history and the Secretary of Labor's regulatory interpretation of the statute should be given dispositive weight because of what the dissent asserts is an ambiguity in the statute. The statute, however, is not at all ambiguous. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that courts and agencies alike are bound to effect an unambiguous statute). The reference in subsection (2)(A)(ii) to "employees not covered by subclause (i)" can only be to employees who are not

[1] The dissent's interpretation of section 7(o) is irreconcilable with this court's decision in *Abbott* v. *City of Virginia Beach*, 879 F.2d 132, 135-36 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990). In *Abbott*, a municipal agency, without reaching an agreement with its employees' designated representative, offered its employees a choice of cash or compensatory time for overtime. We held that a public employer may "enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." 879 F.2d at 135. There is no principled distinction between this case and *Abbott*. If section 7(o) prohibits the award of compensatory time to represented employees absent an agreement between the agency and the representative, as the dissent contends, then compensatory time would not have been permissible under the facts in *Abbott*.

subjects of an agreement between their agency and their representative. It cannot grammatically (and does not logically) refer to employees who are unrepresented because the compound objects of the prepositional phrase "pursuant to" in subsection (i) are the forms of agreement enumerated therein. The subsection does not denominate a class of represented employees; it identifies certain agreements (in addition to those in subsection (ii)) that will satisfy the requirement in subsection (2)(A) that compensatory time be provided pursuant to an agreement.

The dissent searches in vain for ambiguity that would justify resort to the legislative history of setcion 7(o) and the Secretary of Labor's regulatory interpretation of the statute, because these are the only "authorities" that even arguably support its position that Congress intended to impose a requirement that a public agency either reach an agreement with an employee representative or forgo an award of compensatory time. We will never know whether, as the dissent concludes solely from the legislative history, Congress *intended* to impose this requirement. We do know, however, that the statute *did not* impose such a requirement. And in the absence of such a requirement in the statute, we are without authority to impose one. In a system of laws, we have no more authority to give effect to a provision that was intended but not enacted, than we have authority to give effect to a provision that was never intended. The majority recognizes this limitation on the judicial power in its interpretation of section 7(o) in part II, and I join this portion of its opinion.

II.

I cannot, however, join the majority's interpretation of the applicable Labor Department regulations in part III of its opinion. In part III, the majority holds that Local 660 is not a "representative" within the meaning

of 29 C.F.R. § 553.23 "because [it] was not a representative whom the City could recognize consistently with state law." Majority op at 10. The majority offers no support for this interpretation of the term "representative," and the regulation itself would appear to contradict such an interpretation. The regulation expressly states that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b)(1); *see also* H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985) [hereinafter House Report] ("[A] representative . . . need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees . . . ."). The majority's interpretation of the regulation also conflicts with its interpretation of section 7(o). The premise of the court's interpretation of section 553.23 is that if state law permitted collective bargaining by the City, the City would have to pay cash for overtime hours worked unless it reached an agreement with Local 660. *Cf. Dillard*, 885 F.2d at 1555-56. As noted, however, the majority holds in part II of its opinion that the *only* condition on the provision of compensatory time is that it be provided pursuant to one of the forms of agreement specified in subsections (2)(A)(i) or (ii). Because I believe that the majority incorrectly interprets section 553.23 and in doing so undermines its own interpretation of section 7(o), I concur only in the result reached in part III.

I agree with the Fire Fighters and the dissent that Local 660 is a "representative" for purposes of the statute and the regulation. In my view, North Carolina's prohibition against collective bargaining by public agencies, *see* N.C. Gen. Stat. § 95-98, has no bearing whatsoever on whether the local is a "representative" within the meaning of the regulation. *But see State of Nevada Employees' Ass'n, Inc.* v. *Bryan*, 916 F.2d 1384, 1388-90 (9th Cir. 1990); *Nevada Highway Patrol*, 899 F.2d at 1554; *Dillard*, 885 F.2d at 1555-56; *Abbott* v. *City of*

Virginia Beach, 879 F.2d 132, 135-36 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990). I would hold, however, that nothing in either the statute or the regulation requires that a public agency reach an agreement with an employee representative or precludes an agency from striking individual agreements with its employees where a representative has been designated.[2]

The majority in part interprets the term "representative" in the manner it does so as to avoid an interpretation that it mistakenly believes would dictate a result that would conflict with the statute—namely that the City would be required to reach an agreement for compensatory time with the Local or pay cash for overtime work. *See infra* at 17-18. Such a requirement would, indeed, conflict with the court's interpretation of the statute, under which subsections (2)(A)(i) and (ii) set forth alternative means by which a public agency may legally provide compensatory time. But contrary to the majority's assumption, it would not follow from the fact that Local 660 is a legitimate "representative" that the City would be required under the regulation either to reach an agreement with the Local or to pay its employees cash. Even if this were the consequences of the opposing interpretation, the better course would be simply to invalidate the regulation as inconsistent with the statute.

---

[2] The courts that have held otherwise have done so in reliance on the Department of Labor's stated "intention that the question of whether employees have a representative . . . shall be determined in accordance with State or local law and practices." 52 Fed. Reg. 2012, 2015 (Jan. 16, 1987), *quoted in Nevada Highway Patrol*, 899 F.2d at 1554; *Dillard*, 885 F.2d at 1556; *Abbott*, 879 F.2d at 136. This stated intention appears only in the preamble to the final rule codified at 29 C.F.R. part 553. I simply would not allow an interpretation of the regulation to be controlled by the preamble where the regulation affirmatively evidences an intent that the term "representative" not be defined by reference to state law and the preamble itself elsewhere recognizes that "collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative." 52 Fed. Reg. at 2015.

See Chevron, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Section 553.23(a)(1) provides in relevant part that "[n]o agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had [in effect on that date] a regular practice" of granting compensatory time. The purpose of this portion of subsection (a)(1) is merely to define one class of employees to whom public agencies may award compensatory time without an express agreement or understanding. The negative inference from this language is that compensatory time may be awarded to all other employees only pursuant to an express agreement, as the statute by terms requires. Nothing in either the language or logic of this portion of the regulation suggests that if there *is* a representative, then there must be an agreement between the agency and the representative before compensatory time may be awarded. To the extent that the Fire Fighters' argument rests on this portion of the regulation, it should be rejected on this basis alone.

The Fire Fighters' principal contention, however, is not that subsection (a)(1) requires that an agency reach an agreement with a designated representative if it is to provide compensatory time to its employees, but rather that subsection (b)(1) imposes such a requirement. The majority rejects the Fire Fighters' argument based on this provision without discussion on the grounds that they do not have a representative within the meaning of the regulation. *See* majority op. at 10 n.3. Subsection (b)(1) provides that, "[w]here employees have a representative, the agreement or undertaking concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding

or other type of oral or written agreement." 29 C.F.R. § 553.23(b)(1). The Fire Fighters contend that this portion of the regulation affirmatively requires an agreement between the public agency and the representative. This is a plausible reading of the regulation. I would interpret this portion of the regulation, however, merely as an implementation of the statute's requirement that compensatory time be awarded pursuant to an agreement in one of the specified forms. The structure of section 553.23 strongly suggests, if not confirms, that this was the subsection's only purpose. I would not read the section to impose an affirmative negotiation requirement where none exists in the statute itself. If I concluded that the Fire Fighters' interpretation were the only plausible interpretation of the regulation, however, I would invalidate the regulation as contrary to the statute.[3]

I suspect that fundamentally, the majority strains to interpret the regulation in the way that it does so as to preserve this court's decision in *Abbott*. *Abbott* proceeds from the same erroneous premise as the majority's interpretation of the regulation in this case. *Compare Abbott*, 879 F.2d at 135 ("The question here is whether section 207(o) permits public employers to enter into individual agreements with its employees . . . where state law prohibits the employer from entering into agreements with

---

[3] The majority mistakenly assumes that the foregoing analysis of the regulation is directed to a "hypothetical" issue not now before the court—namely, whether a public agency would be required to reach an agreement with an employee representative if that representative were recognizable under state law. *See* majority op. at 9 n.2. It is not. It is directed to the majority's interpretation of the regulation in this case. In my view, that interpretation conflicts with the majority's interpretation of the statute. Given his conflict, it is not an option as a matter of proper appellate review to refuse, as the majority does, to consider the Secretary's authority to promulgate the regulation but to reverse the district court. *See id.* The question, therefore, is not whether appellate review is proper, but whether there has been "proper" appellate review. *Id.*

employee representatives.") *with* majority op. at 10 ("Because Local 660 was not a representative whom the City could recognize consistently with state law . . . the Fire Fighters did not have a representative within the meaning of the regulation . . . ."). It may well be that the majority's interpretation of the statute is in tension, if not directly at odds, with this court's reasoning in *Abbott*. I would abandon *Abbott*'s rationale, however, before I would impose through the regulation a requirement that nowhere exists in the statute.

Under the interpretation of the statute and the regulation that I would adopt, the court would not be required to read into the statute a requirement that the public agency agree with a representative selected by its employees, as the Fire Fighters and the dissent must do. Nor would it be required to force an interpretation of the regulation that is ultimately unsuccessful in harmonizing the regulation with the statute, as the majority does. Moreover, my interpretation would be uniform nationwide, without regard to the patchwork of state laws regarding collective bargaining by public employees that would otherwise condition rights under the Fair Labor Standards Act "upon the mere fortuity of geography." Dissenting op. at 23.

If the statute and regulation are read in the manner that I suggest they should be, they are consistent with each other, and they result in a scheme that reasonably implements Congress' objectives in amending the Fair Labor Standards Act. Subsection (2)(A) ensures that compensatory time is provided "only pursuant to" an agreement, and subsections (i) and (ii) in turn define the agreements pursuant to which compensatory time may be provided. Subsection (i) authorizes compensatory time pursuant to "a collective bargaining agreement," a "memorandum of understanding," *or*, significantly, "any other agreement" between the public agency and an em-

ployee representative. Thus, even if collective bargaining agreements between a union and a public agency are prohibited by state law, an agency and an employee representative may still agree to compensatory time under subsection (i) by entering into some "*other* agreement."

Subsection (ii) defines an alternative, permissible form of agreement. For "employees not covered by subclause (i)"—employees who have not entered into a "collective bargaining agreement," a "memorandum of understanding," or "any other agreement" with their employer through their representative—it permits the provision of compensatory time pursuant to "an agreement or understanding arrived at between the employer and employee before the performance of the work." Thus, if the employees have chosen a representative and the agency does not reach an agreement with that representative for any reason, the agency may enter into individual agreements under subsection (ii) with any employee who wishes. The City's "regular practice" of awarding compensatory time prior to April 15, 1986, for example, constitutes such an individual agreement.

The statute and regulation, so read, also maximize the means available to public agencies and their employees to reach agreements providing for compensatory time, consistent with congressional intent. The one indisputable purpose for Congress' enactment of section 7(o) was to free up public funds by encouraging and facilitating compensatory time awards in lieu of cash payment for overtime hours worked. *See* House Report, *supra*, at 19. The dissent's interpretation of the statute and the regulation would completely frustrate this purpose, and the majority's interpretation of the regulation promises to do the same.

ERVIN, Chief Judge, dissenting:

I respectfully dissent.

I cannot agree with the conclusion reached by the majority in interpreting section 207(o). The majority's position has the inequitable result of resting the rights of public employees under the federal law that purports to protect them, the Fair Labor Standards Act ("the Act"), on the idiosyncracies of state legislatures. Under the majority's view, public employees in states like North Carolina, which prohibit public agencies from engaging in collective bargaining, have fewer rights than those in states that do not have similar prohibitions. I do not think that Congress intended for the protections afforded by the Act to hinge upon the accident of the state in which the employee happens to reside. I also do not think that Congress intended to allow a public employer to force an individual employee to accept compensatory time instead of cash for overtime worked as a condition of taking the job when the employees have designated a representative to ~~negotiate~~ jointly for them. Such an "agreement" is nothing of the sort; it is in reality a unilateral decision by the employer without employee consultation. If the public agency cannot or will not, for whatever reason, deal with the representative chosen by the employees, then it simply loses its right to use compensatory time in lieu of cash under the terms of the Act.

The majority reaches its result by making an ambiguous statute clear through judicial fiat. As the Tenth Circuit recognized, section 207(o) is ambiguous. *See International Ass'n of Firefighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 816-17 & n.1 (10th Cir. 1989). The majority assumes that if a public agency does not enter into an agreement with the representative of its employees to provide compensatory time instead of paid overtime pursuant to subsection 207(o)(2)(A)(i), it may enter into such an agreement with its individual employees pursuant to subsection 207

(o)(2)(A)(ii). Maj. op. at 7. Without discussion, the majority reads subsection (ii), which encompasses "employees not covered by subclause (i)," to refer unambiguously to employees whose representative has not reached an *agreement* with the agency, rather than, as is equally plausible, to employees who have not designated a *representative* to reach an agreement with the agency.

Answering the question of whether "employees not covered by subclause (i)" refers to those who lack an agreement or those who lack a representative disposes of this case. If the phrase refers to the lack of an agreement, as the majority assumes, the fact that the Fire Fighters did not reach an agreement with the City before April 15, 1986 means that the City's regular practice of giving only compensatory time constitutes a valid agreement with those employees pursuant to subsection (ii), and the lack of a subsequent agreement means that the City may force individual employees hired after that date to agree to the same policy as a condition of employment. If the phrase refers to the lack of a representative, however, the fact that the Fire Fighters have designated a representative, Local 660, means that the City can only award compensatory time by reaching an agreement with this representative pursuant to subsection (i). The language of this poorly drafted statute simply does not indicate which reading is the correct one.

We must therefore look to other sources to determine the proper construction of section 207(o)(2). The Secretary of Labor ("the Secretary") has promulgated a regulation interpreting this section. *See* 29 C.F.R. §§ 553.20-553.28 (1991). Because the statute is ambiguous on the issue, we are bound to accept the Secretary's interpretation if it is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). It matters not if the Secretary's construction was not the only permissible one or even if we would have reached a contrary interpretation had we had considered the matter *de novo*.

Id. at 843 n.11. In either case, the Secretary's interpretation controls.

In relevant part, the regulation provides:

> (a) **General.** (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, *who do not have a representative*, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.
>
> . . . .
>
> (b) **Agreement or understanding between the public agency and a representative of the employees.** (1) *Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency* either through a collective bargaining agreement or through a memoradum of understanding or other type of oral or written agreement. *In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.*
>
> . . . .

> (c) **Agreement or understanding between the public agency and individual employees.** (1) Where employees of a public agency *do not have a recognized or otherwise designated representative*, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work.

29 C.F.R. § 553.23 (1991) (emphasis added).

This regulation's meaning is plain in two important respects. First, if the employees have selected a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. The concurring opinion in this case concedes that this is "a plausible reading of the regulation," but suggests an alternative interpretation and states that, if its alternative reading were not available, it would invalidate the regulation as contrary to the statute. Conc. op. at 15. I submit that this reading *is* the only logical way to interpret the regulation, and the regulation read this way is not contrary to the statute because it is consistent with one of the two equally possible readings of the statute.

The regulation must control if it is reasonable. *Chevron*, *supra*. The legislative history clearly supports the Secretary's construction of the statute. *See* S. Rep. No. 159, 99th Cong., 1st Sess. 10-11 (1985), *reprinted in* 1985 U.S.C.C.A.N. 658-59 ["Senate Report"] ("Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer," employer's regular practice may constitute an agreement in the case of employees who have no representative); H.R. Rep. No. 331, 99th Cong., 1st Sess. 20-21 (1985), *reprinted in* 13656 U.S. Cong. Serial Set (Oct. 24, 1985) ["House Report"] ("Where employees have selected a representative, . . . the agreement or understanding must be between the representative

and the employer," regular practice constitutes agreement where employees lack representative). Therefore, the Secretary's position that if employes are represented, an employer can only use compensatory time if it reaches an agreement with the representative is reasonable and we are bound by it. *See Local 2203*, 877 F.2d at 819; *Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549, 1553 (9th Cir. 1990).

Second, the regulation states that employees are deemed to be represented under section 207(o)(2) if they merely designate a representative; the representative need not be recognized by the employer. This means that a state law that prevents an agency from recognizing a public employee union does not preclude the employees from designating a representative for purposes of this section. Again, if reasonable, the Secretary's reading of the provision must control. Congress' choice of words clearly supports this reading. If, as the majority holds, Congress intended that public employees could not designate a representative in states that did not allow collective bargaining, Congress need have gone no further than say that the agreement must be part of a collective bargaining agreement. Instead, the statute states that the agency may provide compensatory time pursuant to "applicable provisions of a collective bargaining agreement, *memorandum of understanding, or any other agreement* between the public agency and representatives of such employees." 29 U.S.C. § 207(o)(2)(A)(i) (emphasis added). The fact that Congress included the possibility of agreement being in some other form indicates that this agreement could be reached in states like North Carolina that do not allow public collective bargaining.

The legislative history also provides ambiguous but sufficient support for the proposition that the representative need only be designated, not recognized; the House Report supports the view and the Senate Report does not. *Compare* House Report at 20, *reprinted* in 13656 U.S. Cong. Serial Set ("Where employees have *selected* a

representative, which *need not be a formal or recognized collective bargaining agent* as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer . . . .") *with* Senate Report at 10-11; *reprinted in* 1985 U.S.C.C.A.N. 658-59 ("Where employees have a *recognized* representative, the agreement or understanding must be between the representative and the employer," an employer may use compensatory time pursuant to a regular practice "[i]n the case of employees who have no *recognized* representative") (emphasis added). Unfortunately, the report of the Joint Committee on Conference fails to address these differing views. *See* H.R. Conf. Rep. No. 357, 99th Cong., 1st Sess. 7-10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 668-71. However, the Senate receded and accepted the House version of the legislation in the Joint Committee on Conference. *Id.* Thus the House's view supportive of the Secretary should be given more weight than the Senate's view, although even one branch's support would be sufficient to find the Secretary's interpretation reasonable. As the concurring opinion notes, the majority's reliance on an isolated statement in the preamble to the Secretary's final regulation, which was later codified at 29 C.F.R. Part 553, that was contradicted elsewhere in the preamble and in the final regulation itself, cannot require state law to control whether employees have a "representative" under the statute. *See* conc. op. at 14 n.2; 52 Fed. Reg. 2012, 2015 (Jan. 16, 1987). Therefore, the Secretary's interpretation that the representative need only be designated, not recognized, is eminently reasonable and should control this case. *See Local 2203*, 877 F.2d at 820. *But see Nevada Highway Patrol*, 899 F.2d at 1554; *Dillard v. Harris*, 885 F.2d 1549, 1554 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990).

The concurring opinion persuasively refutes the majority's formalistic view that the Fire Fighters have no "representative" under section 207(o) because North

Carolina law does not allow the City to recognize one. The concurring opinion goes wrong, in my view, just as the majority does, by forcing one plausible reading of the statute on language that equally supports two such readings and by ignoring the plain import of the Secretary's interpretation of the statute. The Supreme Court has told us in unmistakable terms that we should not substitute our views for that of the agency when the statute is ambiguous, but the majority has done just that. *See Chevron*, 467 U.S. at 865-66.

The practical result of the majority's decision is that the City can refuse to bargain with the employees' representative with the excuse that state law requires this result, thus unilaterally eviscerating the employees' choice in the matter and effectively circumventing the requirements of the Fair Labor Standards Act. According to the majority, employees who reside in states that prohibit public agencies from engaging in collective bargaining have fewer rights under federal law than their counterparts who live in states with no such prohibition. I do not believe that Congress intended for employees' rights under the Act to hinge upon the mere fortuity of geography.

As a panel of this court has previously stated, Congress intended to give employees an element of choice with respect to overtime pay in enacting section 207(o), in addition to providing the state and local governments flexibility in how to pay for overtime work. *Abbott v. Virginia Beach*, 879 F.2d 132, 136-37 (4th Cir. 1989) (quoting House Report at 19), *cert. denied*, 493 U.S. 1051 (1990). The Charlotte Fire Fighters have had no real choice in this matter—those hired before April 15, 1986 must abide by the previous City-imposed practice of compensatory time, and those hired later must agree individually, under highly coercive circumstances where they lack real bargaining leverage, to accept compensatory time as the price for accepting the job. I cannot

believe that Congress intended such a result. Because the City of Charlotte retains the *sole* discretion to award compensatory time instead of cash under the majority's analysis, I agree with the district court that the Act does not permit the City to take advantage of the compensatory time option without entering into an agreement with the employees' designated representative.

For these reasons, I would affirm the district court's decision below.

I am authorized to say that Judge Hall, Judge Phillips, Judge Murnaghan and Judge Sprouse join in this dissent.

No. 92-1

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Lynwood Moreau, *et al.*,
Petitioners,

v.

Johnny Klevenhagen, *et al.*,
Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

HAROLD M. STREICHER
Counsel of Record
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-7164
Attorney for Respondents Johnny Klevenhagen, Sheriff and Harris County, Texas

MIKE DRISCOLL
County Attorney
Of Counsel

QUESTION PRESENTED

The Fair Labor Standards Act as amended provides that public employers may substitute compensatory time at the rate of not less than 1 1/2 hour for each hour of overtime worked in lieu of overtime pay in cash, provided that the compensatory time is pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A).]

Section 207(o) further specifies that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. Section 207(o).]

The question presented here is whether a public agency may reach an agreement regarding compensatory time with individual employees under subclause (ii) when the agency is barred by state law from reaching an agreement with a union representative under subclause (i).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPENDIX

STATUTES AND REGULATIONS

Petitioners have omitted the Texas state laws which prohibit, as against public policy, collective bargaining agreements between a political subdivision and employee representatives unless the voters of the political subdivision have approved the Texas Fire and Police Employee Relations Act. Tex.Rev.Civ.Stat.Ann., Art. 5154c and 5154c-1 (Vernon 1987). These Texas laws are reproduced as Respondents' Appendix A and B.

STATEMENT OF THE CASE

1. The subject matter of this litigation is whether Respondents' policy of compensatory time off ("comp time"), in lieu of cash payments, to individual deputy sheriff-Petitioners is authorized pursuant to 29 U.S.C. section 207(o). Respondents do not concur with Petitioners' Statement of the Case #1. A correct statement of the law is that the Fair Labor Standards Act (hereinafter "FLSA") as amended provides that public employers may substitute compensatory time at the rate of not less than 1 1/2 hour for each hour of overtime worked in lieu of cash payments of 1 1/2 times the employee's normal pay for overtime worked, provided that the compensatory time is pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees, or (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. See FLSA Section 7, 29 U.S.C. Section 207(o)(2)(A)(i) and (ii). (Pet. App. E).

The Secretary of Labor, in responding to expressed concern that an agreement between the public agency and representatives of employees [FLSA section 207(o)(2)(A)(i)] would conflict with some state laws, expressly stated that it is not the intent of the Department of Labor to preempt state law:

> The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices. 52 Fed. Reg. 2014-15 (January 16, 1987), codified at 29 C.F.R. Part 553.23 (Pet. App. E, p. 35a).

In the present case, an agreement with a representative under Section 207(o)(2)(A)(i) would conflict with Texas law. Under Texas law, a political subdivision can not enter into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act. Tex.Rev.Civ.Stat.Ann. art. 5154c and art. 5154c-1. (Resp. App. A). Harris County constituents have not voted to adopt this act; thus, the County has no authority to bargain with the Union.

2. The Harris County Deputy Sheriffs who are named as petitioners along with the Harris County Deputy Sheriffs Union, Local 154 (hereinafter "Union"), are employed by Harris County, Texas in the Harris County Sheriff's Department under the Sheriff of Harris County, Johnny Klevenhagen (hereinafter, collectively "County"). Under the Harris County pay system, deputy sheriffs receive compensatory time as overtime compensation. Time worked over 40 hours per week, if not taken off during the week

worked, is accumulated in a "comp time" bank for the individual at 1 1/2 times the overtime hours actually worked. After the deputy reaches 240 hours in his "comp time" bank, he or she is paid in cash. Under FLSA Section 207(o)(2)(B) (Pet. App. E), the County's pay system which was in effect on April 15, 1986, the date the statute became effective, constitutes an agreement between the County and deputies hired prior to that date. For deputies hired after April 15, 1986, the individual compensation form signed by each deputy before the performance of work constitutes individual agreements of the type contemplated by Section 207(o)(2)(A)(ii).

3. Petitioners instituted this suit in the United States District Court for the Southern District of Texas, Houston Division, on April 15, 1988, alleging that they are not properly compensated for their individual overtime, pursuant to Section 207(o). Plaintiffs/Petitioners moved for partial summary judgment, claiming that Defendants/Respondents violated FLSA by: (1) Defendants'/Respondents' use of compensatory time in lieu of cash payment without bargaining with Harris County Deputy Sheriff's Union, Local 154, as the individual petitioners' representative, (2) Defendants'/Respondents' exclusion of "longevity pay" in the calculation of Plaintiffs'/Petitioners' "regular rates" of pay for the purpose of computing overtime rates, and (3) Defendants/Respondents refusal to use Plaintiffs'/Petitioners' firearm training hours as hours worked. Defendants/Respondents also moved for summary judgment. The trial court denied Plaintiffs'/Petitioners' motion for partial summary judgment and granted Defendants'/Respondents' motion for summary judgment on all three issues in its Final Judgment entered September 5, 1990. (Pet. App. C). In his Memorandum and Order of September 5, 1990, (Pet. App. B), Judge DeAnda, Chief Judge of the Southern District of Texas, Houston Division, points out that the principle area of disagreement in the case is whether subclause (i) or

subclause (ii) of FLSA Section 207(o)(2)(A) is applicable, and states that the answer turns on the meaning attached to the phrase "not covered by subclause (i)" found in subclause (ii). He held that subclause (i) does not control in the present case since Local 154 can not be a recognized representative because the voter adoption requirements in Texas law, Tex.Rev.Civ.Stat.Ann., Art. 5154c Section 1, have not been met, and therefore, subclause (ii) controls and the individual agreements between the employees and Harris County places Defendants/Respondents in compliance with FLSA section 207(o). In this opinion Judge DeAnda relies on the decision of the Eleventh Circuit in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied* 111 S.Ct. 210 (1990).

Petitioners then filed a Notice of Appeal from the final judgment to the Fifth Circuit Court of Appeals on September 25, 1990, pursuant to 28 U.S.C. Section 1291. On March 31, 1992, the Fifth Circuit rendered its opinion (Pet. App. A) and affirmed the grant of summary judgment on the first two claims (the compensatory time issue and the longevity pay issue) but reversed and remanded to the district court for further proceedings respecting the third issue, finding that the Plaintiffs/Petitioners were misled by the district court's bifurcation of the case and thereby prevented from presenting adequate summary judgment proof on the issue of hours used by deputies in firearm training. In affirming the district court's judgment regarding the compensatory time issue that is presently before this Court, the Fifth Circuit addressed Appellants'/Petitioners' contention that even in light of the Texas law that prohibits political subdivisions from entering into collective bargaining agreements, the County was still required to enter into an agreement with the Union before it could pay deputies in comp time because under Section 207(o)(2)(A)(i) comp time may be authorized pursuant to agreements that are not classified as collective bargaining agreements, and thus not violative of Texas

law. The Fifth Circuit rejected Appellants'/Petitioners' argument, holding that "Texas law prohibits **any bilateral** agreement [emphasis added by Respondents] between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the County could not enter into **any** agreement with the Union [emphasis supplied by Fifth Circuit]." The Fifth Circuit held that, because Texas law prohibits the County from entering into a collective bargaining agreement with the Union, there is no such agreement, and the deputies are not covered by subclause (i) of Section 207(o)(2)(A), but rather by subclause (ii). The Court went on to hold that the payment of comp time in lieu of cash is proper because the County is in compliance with Section 207(o)(2)(A)(ii) in that the County's pay system which was in effect on April 15, 1986, constitutes an agreement between the County and deputies hired prior to that date, and the individual compensation form signed by each deputy hired after April 15, 1986, constitutes individual agreements between the County and such deputies.

SUMMARY OF THE ARGUMENT

This case should not be reviewed on certiorari (1) because this case raises no conflicting circuit court opinions commanding reconciliation by this Court, (2) because the Fifth Circuit's opinion is fairly narrow in effect and raises no issues of national importance, and (3) because Petitioners have failed to present their petition for certiorari with accuracy as required by Rule 14.5. Further, the Fifth Circuit's decision was accurately and fairly decided and Petitioners should not seek this Court to merely serve as a "super-appellate" court to review legal principles and factual findings which have been decided adversely to them.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.
THE FIFTH CIRCUIT'S MOREAU OPINION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS DECIDING THESE SAME OR SIMILAR MATTERS.

Four United States Courts of Appeals, in addition to the Fifth Circuit, have rendered opinions regarding the issues involved with FLSA Section 207(o). The Fourth, Eleventh, and Ninth Circuit opinions are directly on point as to the question presented in the present case and are in agreement with the holding in the present case. The Tenth Circuit opinion is not on point as it does not raise the issue of state law preclusion of an agreement between a public agency and an employee representative, but instead renders a decision on a separate issue.

A. The Tenth Circuit: *West Adams*

The first court of appeals to interpret FLSA Section 207(o) was the Tenth Circuit in *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). Petitioner misstates the facts and mischaracterizes this case. Petitioner contends

> [t]he Fire District averred that it was precluded from entering into such an agreement since Colorado - like Texas here -... precluded it [Fire District] from entering into an agreement with the representative under Section 207(o)(2)(A)(i), and that it was therefore free under Section 207(o)(2)(A)(ii) to follow its past practices regarding compensatory time regardless of its employees efforts to designate a representative. The Tenth Circuit rejected this argument concluding that under the FLSA, once employees

> designate a representative for purposes of reaching a Section 207(o)(2)(A)(i) agreement, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement with that representative. (Petition, page 7, 8).

With these misstatements, Petitioners would lead this Court to believe that the Tenth Circuit in *West Adams* addressed the same issue that the Fifth Circuit has addressed in the present case and yet reached a different conclusion. However, this is a blatant mischaracterization. The issue of state law specifically precluding a collective bargaining agreement does not even enter into *West Adams*. The alleged Colorado state law and the Fire District allegedly being precluded by such state law from entering into an agreement with representatives is not mentioned, or even alluded to, in West Adams. Colorado State law is not discussed. The issue is certainly not considered by the circuit court in its rationale. This "argument" is not made, much less "rejected" by the Tenth Circuit.

It is possible that Petitioners' inaccuracy is based on a misunderstanding of the Tenth Amendment issue addressed by the court. The Tenth Circuit held that the FLSA statute itself is not unconstitutional as a violation of the Tenth Amendment in that state and local government were intensely involved in the procedure leading up to the FLSA amendment. However, in addressing this issue and other issues in West Adams, the court never touched upon the question of state law precluding collective bargaining nor on whether this would prevent the employee from having representation under subclause (i).

The Tenth Circuit in *West Adams* analyzed the Department of Labor regulations interpreting Section 207(o) and held that (1) if employees have a representative, an employer may pay comp time

in lieu of cash only pursuant to an agreement between the employer and the representative, and that (2) employees are deemed to have a representative by merely designating a representative, whether or not the employer recognizes the representative. This holding does not purport to decide the issue of whether this applies when the public employer is precluded by state law from negotiating with a representative, and, therefore, is clearly distinguishable from this present case.

Even though *West Adams* is not in conflict with the Fifth Circuit's holding in this present case, Respondent would point out that the rationale used in arriving at the *West Adams* conclusion is flawed. The opinion is written by the Honorable Earl E. O'Connor, Chief Judge of the United States District Court for the District of Kansas, sitting by designation. Judge O'Connor's entire rationale is based upon the assumption that the statutory language of Section 207(o) is ambiguous. He examines the Department of Labor's regulations and the legislative history to determine whether the regulations are reasonable, and, having concluded that the statutory language is ambiguous, states the Department's construction of the section, if reasonable, is controlling even if there is an equally reasonable construction which the court would have reached de novo, citing *Blue Cross Association v. Harris*, 664 F.2d. 806 (10th Cir. 1981). Therefore, the *West Adams* opinion is based upon an analysis and application of the law regarding ambiguous statutory language rather than upon the legal principles and analysis of the statute regarding compensatory time.

Respondent asserts that the statutory language which Judge O'Connor finds to be ambiguous is clear on its face when considered in light of the entire subsection 207(o)(2)(A). Judge O'Connor finds the phrase "employees not covered by subclause (i)," which is found at the beginning of subclause (ii) and indicates

which employees are covered by subclause (ii), is ambiguous in that these words have two possible meanings, either referring (1) only to employees who have not designated a representative, or (2) to employees who have designated a representative but that representative and the employer have failed to come to an agreement. Respondent disagrees. By looking to subclause (i) it is easy to see which "employees are not covered by subclause (i)" and thus are covered by subclause (ii). Read in its context, subclause (i) states that a public employer may provide compensatory time in lieu of overtime pay in cash pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees." The subject of this subclause is "agreement." The ability of a public employer to provide compensatory time in lieu of cash payment depends upon an agreement. An agreement can not be an "agreement" unless it is "between" two parties. This statute specifically states it must be "between" the public agency and representatives of such employees. There must be a meeting of the minds. Therefore, subclause (i) refers to employees on whose behalf an agreement between the public agency and a representative has been ma[illegible], and subclause (ii) applies to all other employees, i.e., all employees on whose behalf an agreement has not been reached by a representative and the public agency. This would include those employees who have not designated a representative. Therefore, the statement "the case of employees not covered by subclause (i)" is not ambiguous but has a plain meaning and should be interpreted as such. Judge O'Connor's interpretation that subclause (i) refers to any employee who has designated a representative whether or not an agreement has been reached with that representative by the public employer, and that subclause (ii) refers only to the employee who has not designated a representative is highly inconsistent with the plain language of the entire statute.

See Dillard v. Harris, 885 F.2d 155549 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 210 (1990).

B. The Fourth Circuit: *Abbott and Wilson*

1. *Abbott*

The Fourth Circuit has rendered two opinions on Section 207(o)--*Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 854 (1990), and *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992). Petitioners assert that the Fourth Circuit's two opinions are in conflict. This is contrary to the court's own assertion and holdings. Petitioners also incorrectly assert that *Abbott* is in conflict with *West Adams*. These two cases are clearly distinguishable on the facts and on the issues.

In *Abbott v. City of Virginia Beach* the Fourth Circuit addresses the question of whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory leave in lieu of money for overtime where state law prohibits the employer from entering into agreements with employee representatives. This is the same question that is presently before this court. The *Abbott* court relies on the Secretary of Labor's comments in the preamble of the Labor Department's regulations which states, "[i]t is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] be determined in accordance with State or local law and practices." 52 Fed.Reg. 2012, 2015 (Jan. 16, 1987), codified at 29 C.F.R. Part 553. *Abbott* holds that when state law prohibits agreements between a representative and the public agency, such agreements can not be made because they would "preempt" state law, and the public agency may enter into individual agreements with the employees.

Petitioners try to distinguish the facts of *Abbott* from the present case by pointing out that Virginia law absolutely prohibits local governments from collective bargaining while Texas law has an exception to its prohibition. Texas will only permit collective bargaining by a political subdivisions when the constituents of that political subdivision have voted to adopt the Texas Fire and Police Employee Relation Act pursuant to Tex.Rev.Civ.Stat.Ann., art. 5154c-1 (Vernon 1987). Otherwise, collective bargaining is void as against public policy pursuant to Tex.Rev.Civ.Stat.Ann., art. 5154c (Vernon 1987). Petitioners' distinction is irrelevant and certainly does not help them. Virginia has an absolute prohibition. Texas also has an absolute prohibition with one exception. Harris County does not fit within that exception and therefore the Texas prohibition is absolute in effect under the facts of this case. The voters of Harris County have not voted to adopt the Texas Fire and Police Employee Relation Act and, thus, Texas state law does prohibit the County from collective bargaining. The issue is the same in Abbott and in the present case - both public employers are prevented from entering into agreements with employee representatives by state law. Because of the state law prohibitions, the public employers are not required to reach an agreement with the employee representatives before giving compensatory time in lieu of cash overtime pay. These public employers may have such a compensatory time policy pursuant to individual agreements with the individual employees.

Petitioners assert that *Abbott* cannot be reconciled with *West Adams*. This misstatement is due to their blatant mischaracterization of the facts and conclusion in *West Adams* by inaccurately asserting that the Fourth Circuit considered the issue of a state law precluding the public agency from collective bargaining. *West Adams* did not address the issue of state law, whereas state law is the central issue in *Abbott*. When a state law prohibits an

agreement between an employee representative and the public agency, the rule in *West Adams* is not reached because the consideration of whether subclause (i) controls by the employee merely designating a representative is not raised. Thus, *West Adams* is clearly distinguishable.

Throughout the Petition, Petitioners expand upon the importance of a particular fact issue in *Abbott* and, indeed, mischaracterize *Abbott* by inserting this fact into the rule of the case. Petitioners refer to this factual distinction as "absolute choice of cash." Under the facts of the case, the employer has a policy of allowing each individual employee who works overtime to have a choice between overtime pay and compensatory time. The court notes that such a policy fulfills the central purpose of Section 207(o) in allowing some flexibility by the employer in dealing with the overtime and providing the employee an element of choice. However, even though the court makes note of this policy, the policy is not determinative of the holding in the case. The policy is not an element in the court's conclusion that the Section 207(o) allows ". . . public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." *Id.* at 135. The court's holding does not say that public employers may enter into individual employee agreements where state law prohibits the agency from entering into agreements with employee representatives if the employer gives the employee an absolute choice of cash. *Abbott* does not make a rule regarding "absolute choice of cash." The "absolute choice of cash" is simply a distinguishing part of the fact pattern of this case. Yet, Petitioners mischaracterize the *Abbott* holding as being reflective of the "absolute choice of cash" factual distinction. For example, Petitioners assert that Georgia's mandate of no overtime cash approved of in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989),

cert. denied, 111 S.Ct. 210 (1990). ". . . would have violated the Abbott 'absolute choice of cash' rule." (Petition, page 12). Furthermore, Petitioners' assertion that "Georgia's unilateral mandate of no overtime cash was approved by *Dillard*" (Petition, page 12), is also a fabrication. Georgia does not have a unilateral mandate of no overtime cash. The court in *Dillard* even stated "[t]here is nothing in this case...[to] prevent an individual employee from negotiating for and obtaining an agreement that cash would be paid for his or her overtime work." *Dillard* at 1556. Petitioners seem to have fabricated the *Abbott* "absolute choice of cash rule" and the Georgia "unilateral mandate of no overtime cash" in attempting to convince this Court that the circuits are widely divided in their holdings regarding Section 207(o). Contrary to Petitioners' contention that there is great conflict among the circuits, there is only one issue of disagreement in interpreting the statute (discussed *infra* under *Dillard*), and there is **no** dissention as to the issue of state law that is presented in this present case.

2. *Wilson*

The Fourth Circuit's next opinion regarding Section 207(o), *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992), is also the most recent circuit court opinion on this subject. Again, Petitioners make misstatements of fact by saying that *Wilson* conflicts with the Fourth Circuit's own precedent in *Abbott*. It does not.

Wilson holds that a union representative is not a true "representative" pursuant to subclause (i) of Section 207(O)(2)(A) when the state law prohibits public employers from collective bargaining, and, therefore, the public employer is not required to reach an understanding with the union in order to grant compensatory time in lieu of overtime pay. The court holds that "[b]ecause Local 660 was not a representative whom the City could

recognize consistently with state law . . . the Fire Fighters did not have a representative within the meaning of the regulation . . . ," *id.* at 1396, and therefore, there could be no agreement under subclause (i). The court concluded that since subclause (i) can not apply, subclause (ii) applies. The court found there is an agreement under subclause (ii) because the employees were hired before April 15, 1986, and thus the regular practice in effect on that date constitutes an agreement between the employer and the employees pursuant to Section 207(o)(2). The court therefore held that the employer is in compliance with FLSA Section 207(o) in giving compensatory time off in lieu of cash payments. This holding is completely consistent with *Abbott*, contrary to the assertions of Petitioners. This opinion merely gives a detailed analysis behind the underlying rule of both *Abbott* and *Wilson* which states that when state law prohibits an agreement with a representative under subclause (i), then subclause (ii) applies. Wilson was decided just six weeks after the Fifth Circuit decision in this present case, and these two holdings are also entirely consistent.

Petitioners' contention that *Abbott* and *Wilson* are in conflict is probably due to their misunderstanding of the *Abbott* holding. Petitioners incorrectly state at several places in the Petition that *Abbott* agreed with *West Adams* in accepting the purported interpretation of Section 207(o) that where employees have designated a representative, the employer must reach an agreement with that representative or pay money for overtime. (Petition, page 13). In other words, the employer does not have the option of entering into an agreement with the employee if an agreement is not made with the representative. *Abbott* does not agree with this construction. The court in *Abbott* reviewed the legislative history and the conflict between the Senate and the House as to this issue, and acknowledged that the Secretary of Labor followed the House position that once a representative has been designated by an

employee, the employer can only enter into an agreement regarding comp time with that representative, and, if no agreement is reached, the employer must make cash payment for overtime. This position is at odds with the Senate position that the employer may enter into an agreement regarding comp time with the individual employees who are not covered by an actual agreement between the employer and the designated representative. Even though the court in *Abbott* discusses this issue, they do not state their own conclusion as to the issue as it is not necessary to their holding. In *Wilson*, however, the Fourth Circuit does take a position on this issue by holding that if a public agency does not enter into an agreement with a representative designated by its employees, it may enter into such an agreement with its individual employees pursuant to subclause (ii), thereby agreeing with the Senate understanding. *Id.* at 1, citing *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990). This issue of whether subclause (i) controls by an agreement with the representative as opposed to the mere designation of a representative by the employee is the one issue that is in disagreement among the circuits. This issue, as discussed *infra*, is not raised by the question before the Court in the present case.

C. The Eleventh Circuit: *Dillard*

The Eleventh Circuit addresses the FLSA Section 207(o) issue in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, ___U.S. ___, 111 S.Ct. 210 (1990). The holding in this case is completely consistent with *Abbott* and *Wilson*, as well as with the present case. In fact, the Fifth Circuit relied on *Dillard* along with the Fourth Circuit opinion in *Abbott*. All three cases have the same fact situation: (1) the employees had designated a representative, (2) state law prohibited the public employer from entering into a collective bargaining agreement, and (3) the public employer, without an agreement with the employees' representative, had

established a pay system providing for comp time. In *Dillard*, the court declared that it agrees with, and is following *Abbott*, holding that if state law prohibits collective bargaining, the public employer is precluded from entering into an agreement with the employee's representative, and can enter into an agreement with the individual employees. However, while stating that it is following *Abbott*, the court discusses an alternative approach that reaches the same result. Under this alternative approach, Chief Judge Roney examines the legislative history, the regulations, and the rules of statutory construction and concludes that under the plain language of Section 207(o), the pivotal issue of the applicability of subclause (i) is whether there is an "agreement." If there is not an actual "agreement" between the public employer and the employee representative, then subclause (ii) can come into play and the employer and employee can have an individual agreement. Judge Roney points out that under this alternative analysis, the state law issue need not be considered because if state law prohibits the public agency from collectively bargaining with employee representatives, there can not be an "agreement" between them, and therefore subclause (ii) would be in effect.

This alternative approach in *Dillard* disagrees with the holding by the Tenth Circuit in *West Adams* that the pivotal issue is whether the employee has "designated" a representative. Under *West Adams* the mere designation of a representative under subclause (i) precludes the public employer from having a comp time policy unless there is an agreement as to this policy by the representative. Under *Dillard*'s well-reasoned alternative approach, even though the employee has designated a representative, if the agency and the representative have not come to an agreement, subclause (i) is not in effect and the agency and the employee can individually agree as to a comp time policy under subclause (ii). Under the *Abbott* analysis adopted by the *Dillard* court, the fact that

state law precludes any agreement between a public agency and a representative has the effect of preventing subclause (i) from being in the picture in the first place, and therefore this issue is not raised.

This alternative approach is merely a secondary way to arrive at the conclusion and is not necessary to the decision reached in *Dillard*, a case concerning which this court has denied a petition for writ of certiorari. Certiorari should not be granted based upon this conflict. Even though this alternative approach does represent a conflict with the Tenth Circuit, this issue is not ripe for decision by this court. The Tenth Circuit's decision in *West Adams* was the first holding on this issue. As other circuits have opportunity to address this issue in the future, more will be written on the subject and it is probable that the conflict will resolve itself.

D. The Ninth Circuit: *Nevada Highway Patrol*

The Ninth Circuit addresses the Section 207(o) issue in *Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir. 1990) and agrees with the Fourth and Eleventh Circuits (as well as the Fifth Circuit in this present case) that the analysis of whether subclause (i) of Section 207(o)(2)(A) should apply should begin with reference to state law. *Id.* at 1554. The court held that the public employer may use compensatory time off in lieu of overtime compensation only pursuant to agreement with employees' representative, if employees are represented; however, the determination of whether public employees have a representative should begin with reference to state law. If the state law is contrary, the employee is deemed not represented. "If an agreement is precluded by state law we must then look to [subsection] (ii)." *Id.* at 1554. This holding is clearly dispositive of the question presented in this case.

Under the facts of *Nevada Highway Patrol*, the court found that Nevada law did **not** preclude collective bargaining between the state agency and the representatives of state employees. Nevada law does preclude collective bargaining unless the legislature formally recognizes the employee's representatives. The court found that the legislature had formally recognized the Nevada State Employees Association (NSEA) as the representative of its members, and, therefore, collective bargaining is not precluded by the state law. After deciding state law does not preclude collective bargaining under these facts, the court then moves on to the second stage of the analysis and applies the *West Adams* rule. Under this rule, since NSEA is lawfully and clearly the employee's representative under subclause (i), a compensatory time-off policy in lieu of overtime compensation can not be enacted by the state agency absent an agreement with the NSEA.

Because the *Nevada* legislature had formally recognized NSEA, the Ninth Circuit in *Nevada Highway Patrol* then agreed with the Tenth Circuit in *West Adams* that the key factor in subclause (i) is whether the employee has designated a representative, whereas, the Fourth, Eleventh, and Fifth Circuit agree that the key factor is whether the employer and the representative have reached an agreement. However, even though there is disagreement on this particular issue, the Ninth Circuit agrees with the Fourth, Eleventh, and Fifth Circuits in holding that a state law preclusion of a public employer from entering an agreement with a representative usurps this other issue from being raised because the employer is precluded from coming into an agreement under subclause (i). Thus, these courts are all in agreement with the Fifth Circuit as to the issue in the present case.

Petitioners engage in yet another fabrication in the discussion of *Nevada Highway Patrol*. Petitioners assert that "the Ninth Circuit recognized that even when state law precludes collective bargaining, the state may allow representation, informal agreements and understandings which would satisfy Section 207(o)(2)(A)(i)." (Petition, page 14). This statement is not made in *Nevada Highway Patrol* and there is nothing in the opinion that should lead Petitioners to make this statement. Petitioners also state "the court concluded that the labor organization is an informal representative within the meaning of Section 207(o)(2)(A)(i)." (Petition, page 14). This is another fabrication. The words "informal agreement" or "informal representative" are not even used by the court in *Nevada Highway Patrol*. Indeed, the Nevada state law precludes collective bargaining unless the legislature "formally" recognizes the employees representatives. In reading footnote #5 along with the above two statements, it becomes apparent that Petitioner mischaracterized the court's conclusion in order to try to make the Fifth Circuit's decision come out differently if applied under this misstated Ninth Circuit opinion. Petitioners are inferring that Local 154 is a recognized informal representative and therefore, under this false Ninth Circuit rule, the County could only give comp time by coming to an agreement with Local 154 and would not be able to have individual agreements with employees regarding the comp time. In attempting to present this argument, Petitioners also mischaracterize Texas law. Even an "informal" agreement by the County with a representative regarding overtime pay would violate Texas law. Petitioners state that Local 154 is recognized generally as the representative of its members with regard to their work place concerns by the Harris County Sheriff under Texas law, citing Tex.Rev.Civ.Stat.Ann., art. 5154c, Section 6. It is true that under this statute, representatives are allowed to present employee "grievances," a unilateral concern, to state agencies. However, under art. 5154c Section 1, state

agencies are not allowed to engage in any contracts (bilateral agreements) with representatives respecting the wages, hours, or conditions of employment of public employees. This is a violation of Texas public policy unless five per cent of the voters have signed a petition to get the issue on a November ballot and subsequently a majority of the voters have specifically voted to adopt the Fire and Police Employee Relation Act of art. 5154c-1. Texas case law, *Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App.--El Paso 1956, no writ) and the Fifth Circuit in this present case hold that agreements such as the one contemplated by Section 207(o)(2)(A)(i) is such a bilateral agreement. Any agreement by County with Local 154, whether characterized as informal or collective bargaining, is prohibited by Texas law.

In applying the facts of this present case to the Ninth Circuit rule, the end result is exactly the same. The first step under *Nevada Highway Patrol* is to apply state law. Texas law precludes the County from bargaining with Local 154 since the voting requirements of Tex.Rev.Civ.Stat.Ann., art. 5154c-1 have not been adopted. Therefore, under the Ninth Circuit rule, subclause (ii) covers the situation since the agreement under subclause (i) is precluded. The County has individual agreements as to comp time with its petitioners/employees who were hired prior to April 15, 1986, because of its prior practices, and the County has individual agreements with its petitioners hired after April 15, 1986, by reason of the individual compensation form signed by each deputy. The County is in compliance with FLSA Section 207(o)(2) under the Ninth Circuit rule.

E. Conclusion

The Fifth Circuit in the present case held that because Texas law prohibits the County from entering into a collective bargaining agreement with the Union, there is no such agreement, and the deputies/petitioners are not covered by the stipulation regarding representatives in subclause (i), but rather are covered by the individual agreement stipulation in subclause (ii). Certiorari should be denied because this opinion does not conflict with the decisions of the other United States Courts of Appeal who have decided the issue of the applicability of subclauses (i) and (ii) of FLSA Section 207(o)(2)(A) where state law precludes public employers from entering into agreements with employee representatives. The Fourth Circuit in *Abbott* held that when state law prohibits agreements between a representative and the public agency, such agreements can not be made because they would "preempt" state law. and the public agency may enter into individual agreements with the employees. The Fourth Circuit further held in *Wilson* that a union representative is not a true "representative" pursuant to subclause (i) when the state law prohibits public employers from collective bargaining, and, therefore, the public employer is not required to reach an understanding with the union in order to grant compensatory time in lieu of overtime pay. The Eleventh Circuit in *Dillard* held that if state law prohibits collective bargaining, the public employer is precluded from entering into an agreement with the employee's representative, and can enter into an agreement with the individual employees. The Ninth Circuit in *Nevada Highway Patrol* held that the determination of whether public employees are represented pursuant to subclause (i) should begin with a reference to state law and if the state law is contrary, the employee is deemed not represented. Clearly, the Fourth, Eleventh, and Ninth Circuit's holdings are supportive of the Fifth Circuit holding. The only other United States Circuit to render a decision as to the interpretation of FLSA Section 207(o), the Tenth Circuit in *West Adams*, does not

address the state law preclusion issue. Petitioners' argument that certiorari should be granted because severe conflict exists among the Courts of Appeal is without merit. The circuits are not in conflict on the issue before the Court, and certiorari should not be granted.

II.
THE FIFTH CIRCUIT'S MOREAU OPINION IS ACCURATELY DECIDED AND IS FAIR TO ALL PARTIES

The Fifth Circuit's opinion in the present case is accurately decided and is also fair to the parties. The accuracy of the opinion is evidenced by the fact of the court's full consideration of the Texas state law, the substantial evidence as to the facts of the case, and the fact that the court's opinion is fully in accord with the opinions of the other circuits regarding the issue. Any other decision would have been inaccurate and unsupported by any other circuit. The fairness of the decision to the deputies/petitioners is evidenced by the fact that the comp time policy is only effective by way of an agreement made with the deputies themselves. The fairness of the decision to the County is evidenced by the fact that the County is given some flexibility in handling the overtime compensation situation.

III.
THE ONE AREA OF DISSENTION AMONG THE UNITED STATES COURTS OF APPEAL REGARDING FLSA SECTION 207(O) IS NOT RAISED BY THE PRESENT CASE AND IS NOT RIPE FOR DECISION BY THIS COURT

The one area of conflict among the United States Courts of Appeal regarding FLSA Section 207(o) is in regard to when an employee is covered by subclause (ii) as opposed to subclause (i). The Tenth Circuit and Ninth Circuit hold that the employee is covered by subclause (i) upon the mere designation of a representative and subclause (ii) only covers employees who have not designated a representative. The Fourth and Eleventh Circuits hold that the employee is covered by subclause (i) upon an agreement between the employer and the employee representative and any employee not subject to such an agreement is covered by subclause (ii). This issue is not raised in the present case. When state law precludes an agreement between a public agency and an employee representative, subclause (i) does not cover the employee. It is immaterial whether or not the employee designates a representative or whether or not the public agency and the representative reach an agreement. Therefore, certiorari should not be granted in the present case based upon this particular conflict among the circuits, which is not in issue in this case.

Furthermore, the issue in conflict is not ripe for decision by this Court. This legal issue is in a state of flux and would benefit from further consideration by lower courts. As other cases and fact patterns are presented in the future and more is written by way of analysis by these and other circuits, it is probable that this issue will resolve itself.

IV.
DECISION TURNS ON ITS FACTS AND WILL NOT HAVE A GREAT NATIONAL EFFECT

The Fifth Circuit's opinion in the present case turns on its own facts, namely the Texas state law that precludes collective bargaining by the County. This opinion is fairly narrow in its effect and is of minor importance in the overall structure of the law. This holding affects the interpretation of FLSA Section 207(o) only as it applies to parties in states with state laws that preclude collective bargaining. Certiorari should not be granted in that the Fifth Circuit's opinion is narrow in it's effect upon the interpretation of Section 207(o) and does not raise an issue that has wide national application.

V.
PETITIONER'S FAILURE TO ACCURATELY PRESENT HIS ARGUMENTS IN THE PETITION

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition." (S.Ct. Rule 14.5). Petitioners have continually misstated and mischaracterized fact and law in the Petition. Respondents have been constrained to spend much time in repeatedly responding to Petitioners' misstatements. Following is a brief recap of the most blatant misstatements and mischaracterizations: (1) In their discussion of *West Adams*, Petitioners incorrectly and blatantly assert that the Tenth Circuit considered and rejected the argument that state law precludes

collective bargaining. (Petition, page 7, 8). (2) Petitioners mischaracterized the *Abbott* holding as having an "absolute choice of cash rule." (Petition, page 12). (3) In their discussion of *Dillard*, Petitioners fabricated a "Georgia unilateral mandate of no overtime cash approved by *Dillard*." (Petition, page 12). (4) Petitioners wrongly assert that the Ninth Circuit in *Nevada Highway Patrol* recognizes that even when state law precludes collective bargaining, the state may allow representation, informal agreements and understandings which would satisfy Section 207(o), again fabricating something that is not even mentioned in the opinion. (Petition, page 14). (5) Also, in their *Nevada Highway Patrol* discussion, Petitioners state that the court concluded that the labor organization is an informal representative within the meaning of Section 207(o)(2)(A)(i), when the court makes no such conclusion. (Petition, page 14). These and the other examples of misstatements and mischaracterizations made by Petitioners compel summary denial of Petitioners' Petition.

CONCLUSION

Petitioners have failed to establish any reason for this Court to grant certiorari in this case. Respondents therefore ask this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

Harold M. Streicher

HAROLD M. STREICHER
Counsel of Record
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-7164
Fax No. (713) 755-8924
Attorney for Respondents[1]

MIKE DRISCOLL
County Attorney
Of Counsel

---

1 *Judy Robinson, a third year law student, participated in this preparation of this brief in opposition.*

Appendix A

APPENDIX A – TEX. REV. CIV. STAT. ANN., ART. 5154c

Art. 5154c. Public employees collective bargaining contracts with organizations representing; strikes; loss of civil service and other rights

Sec. 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.

Sec. 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees.

Sec. 3. It is declared to be against the public policy of the State of Texas for public employees to engage in strikes or organized work stoppages against the State of Texas or any political subdivision thereof. Any such employee who participates in such a strike shall forfeit all civil service rights, re-employment rights and any other rights, benefits, or privileges which he enjoys as a result of his employment or prior employment, providing, however, that the right of an individual to cease work shall not be abridged so

long as the individual is not acting in concert with others in an organized work stoppage.

Sec. 4. It is declared to be the public policy of the State of Texas that no person shall be denied public employment by reason of membership or nonmembership in a labor organization.

Sec. 5. The term "labor organization" means any organization of any kind, or any agency or employee, representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Sec. 6. The provisions of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike.

Sec. 7. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved.

APPENDIX B – TEXAS FIRE AND POLICE EMPLOYEE RELATIONS ACT, TEX. REV. CIV. STAT. ANN., ART. 5154c-1

Art. 5154c-1. The Fire and Police Employee Relations Act

Designation of act

Sec. 1. This Act shall be known as "The Fire and Police Employee Relations Act."

Policy

Sec. 2. (a) It is declared to be the policy of the State of Texas that cities, towns, and other political subdivisions within the state having police and/or fire departments shall provide the firefighters and policemen, in said departments, with compensation and other conditions of employment that are substantially the same as compensation and conditions prevailing in comparable private sector employment.

(b)(1) It is also the policy of the State of Texas that firefighters and policemen, like employees in the private sector, should have the right to organize for purposes of collective bargaining, for collective bargaining is deemed to be a fair and practical method for determining wages and other conditions of employment for the employees who comprise the paid fire and police departments of the cities, towns, and other political subdivisions within this state. A denial to such employees of the

Appendix B

right to organize and bargain collectively would lead to strife and unrest, with consequent injury to the health, safety, and welfare of the public. The protection of the health, safety, and welfare of the public, however, demands that strikes, lockouts, work stoppages and slowdowns of firefighters and policemen be prohibited; therefore, it is the obligation of the state to make available reasonable alternatives to strikes by employees in these protective services.

(2) In view of the essential and emergency nature of the public service performed by firefighters and policemen, a reasonable alternative to such strikes is a system of arbitration conducted under adequate legislative standards. Another reasonable alternative, which should be provided in the event the parties fail to agree to arbitrate, is judicial enforcement of the requirements of this Act regarding the compensation and working conditions applicable to firefighters and policemen.

(3) With the right to strike prohibited, it is requisite to the high morale of firefighters and policemen, and to the efficient operation of the departments which they serve, that alternative, procedures be expeditious, effective, and binding. To that end, the provisions of this Act should be liberally construed.

Definitions

Sec. 3. As used in this Act, the following terms have the following meanings:

Appendix B

(1) The term "firefighter" means each permanent paid employee in the fire department of any city, town, or other political subdivision within the state, with the sole exception of the chief of the department. Nothing herein shall apply to volunteer firefighters.

(2) The term "policeman" means each sworn certified full-time paid employee, whether male or female, who regularly serves in a professional law enforcement capacity in the police department of any city, town, or other political subdivision within the state, with the sole exception of the chief of the department.

(3) The term "public employer" means the proper official or officials within any city, town, or political subdivision whose duty is to establish the wages, salaries, rates of pay, hours, working conditions, and other terms and conditions of employment of firefighters and/or policemen whether such person or persons be the mayor, city manager, town manager, town administrator, city council, director of personnel, personnel board, commissioners, or other officials, by whatever name designated, or by a combination of such persons.

(4) The term "association" means any organization of any kind, or any agency or employee representation committee or plan, in which firefighters and/or policemen participate and which exists for the purpose, in whole or in part, of dealing with one or more employers, whether public or private, concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or conditions of work affecting firefighters and/or policemen.

(5) "Strike" means the failure, in concerted action with others, to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, or in any manner interfering with the operation of any municipality, for the purpose of inducing, influencing, or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

Requirement for prevailing wages and conditions

Sec. 4. Cities, towns, and other political subdivisions within the state employing firefighters and/or policemen shall provide those protective service employees with compensation and other conditions of employment that are substantially the same as compensation and other conditions of employment which prevail in comparable private sector employment; therefore, compensation and other conditions of employment for those employees shall be based on prevailing private sector wages and working conditions in the labor market area in other jobs, or portions of other jobs, which require the same or similar skills, ability, and training, and which may be performed under the same or similar conditions.

Right to organize and bargain collectively

Sec. 5. (a) Upon the adoption of the provisions of this Act by any city, town, or political subdivision in this state to which this Act applies, as herein in this section provided, firefighters and/or policemen shall have the right to organize and bargain collectively with their public employer as to wages, hours, working conditions, and all other terms and conditions of employment.

(b) The provisions of this Act may be adopted by any city, town, or other political subdivision to which this Act applies by the following method:

Upon receiving a petition signed by the lesser of five percent or 20,000 of the qualified voters voting in the last preceding general election in such city, town, or political subdivision, the governing body of such city, town or political subdivision shall hold an election within 60 days after said petition has been filed with such governing body. If at said election, a majority of the votes cast shall favor the adoption of this Act, then such governing body shall place this Act into effect within 30 days after the beginning of the first fiscal year of said city or town after said election. The question which shall be submitted to the vote of the qualified electors shall be as follows:

Appendix B

FOR or AGAINST the following:
Adoption of the state law applicable to "firefighters and policemen" or "firefighters" or "policemen", (whichever shall be applicable), which establishes collective bargaining when a majority of the affected employees favor representation by an employees' association and which preserves the prohibition of strikes and lockouts and provides penalties therefor.

(c) In any city, town, or political subdivision in which the provisions of this Act have been in effect for a period of one year, if a petition signed by the lesser of five percent or 20,000 of the qualified voters voting in the last preceding general election in such city, town, or political subdivision shall be presented to the governing body thereof to call an election for the repeal of the adoption of the provisions of this Act, then and in that event, the governing body shall call an election of the qualified voters to determine if they desire to repeal such adoption. If at said election, a majority of the votes cast shall favor the repeal of the adoption of this Act, then the provisions hereof shall become null and void as to such city, town, or political subdivision. The question which shall be submitted to the vote of the qualified electors shall read as follows:

FOR or AGAINST the following:
Repeal of the adoption of the state law applicable to "firefighters and policemen" or "firefighters" or "policemen", (whichever shall be applicable), which establishes collective bargaining when a majority of the affected employees favor representation by an

Appendix B

employees' association and which preserves the prohibition of strikes and lockouts and provides penalties therefor.

(d) When any election has been held in any city, town, or political subdivision at which election the adoption or rejection of the adoption of this Act has been submitted as aforesaid, a like petition for another such election shall not be filed for at least one year subsequent to the election so held.

Recognition of bargaining agent

Sec. 6. (a) An association selected by a majority of the paid firefighters of a fire department in any city, town, or other political subdivision, excluding the chief of the department, shall be recognized by the public employer as the sole and exclusive bargaining agent for all of the fighters of that department unless and until recognition of such association is withdrawn by a majority of those firefighters.

(b) An association selected by a majority of the sworn certified fulltime paid policemen of a police department in any city, town, or other political subdivision, excluding the chief of the department, shall be recognized by the public employer as the sole and exclusive bargaining agent for all of the policemen of that department, unless and until recognition of such association is withdrawn by a majority of those policemen.

(c) In the event of a question as to whether or not an association is the majority representative of the employees in a department, pursuant to this section, such question concerning representation shall be resolved by a fair election conducted according to procedures agreeable to the parties. If the parties are unable to agree on such procedures, either party may request the American Arbitration Association to conduct the election and to

certify the results thereof. Certification of the results of an election held pursuant to this section shall resolve the question concerning representation. The public employer shall be responsible for the expenses of the election, provided however that if two or more associations seek recognition as the bargaining agent then said associations shall share the costs of such election equally.

(d) Although the fire and police departments within the same city, town, or other political subdivision shall constitute separate collective bargaining units under this Act, nothing contained herein shall prevent associations representing employees in both of these departments within the same city, town, or other political subdivision from voluntarily joining together for purposes of collective bargaining with the public employer.

Sec. 7. (a) Whenever the firefighters and/or the policemen of a city, town, or other political subdivision of the state are represented by an association in accordance with Section 6 of this Act, the public employer and the association shall be obligated to bargain collectively.

(b) For purposes of this section, to bargain collectively is the performance of the mutual obligation of the public employer and the association to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

(c) The association or the public employer may designate any person or persons to negotiate or bargain on its behalf; and the parties may utilize mediation, pursuant to Section 9 of this Act, to assist them in arriving at an agreement.

(d) Whenever wages, rates of pay, or any other matter requiring appropriation of money by any governing body are included as a matter for collective bargaining pursuant to this Act, it shall be the obligation of the association to serve written notice of request for such collective bargaining on the public employer at least 120 days before the conclusion of the current fiscal operating budget.

(e) All deliberations pertaining to collective bargaining between an association and a public employer or any deliberation by a quorum of members of an association authorized to bargain collectively or by a member of a public employer authorized to bargain collectively shall be open to the public and in compliance with the Acts of the State of Texas.

Enforceability of agreements

Sec. 8. Whenever a public employer and an association reach an agreement on compensation and/or other terms and conditions of employment for firefighters or policemen, pursuant to the provisions of this Act, the public employer shall be deemed to be in compliance with the requirements of Section 4 hereof as to such terms and conditions of employment for the duration of agreement. The agreement shall be enforceable and shall be binding upon the public employer, the association, and the firefighters or policemen covered herein.

Impasse procedures and voluntary mediation

Sec. 9. (a) In any dispute between a public employer and its protective services employees represented by an association, pursuant to this Act, where an impasse is reached in the collective bargaining process, or where the appropriate lawmaking body fails to approve a contract reached through collective bargaining, and as a result the public employer and employees are unable to effect a

settlement, then either party to the dispute, after written notice to the other party containing specifications of the issue or issues in dispute, may request appointment of an arbitration board; provided, however, a party shall not request arbitration more than once during any fiscal year.

(b) For purposes of this section, an impasse in the collectively bargaining process shall be deemed to occur when the parties do not reach a settlement of the issue or issues in dispute by way of written agreement within 60 days after initiation of the collective bargaining proceedings. The period, however, may be extended by written agreement for additional periods of time provided each such extension of time is for a definite period not to exceed 15 days.

(c) Prior to invoking arbitration, the parties shall make every reasonable effort to settle their dispute through good-faith collective bargaining; such efforts shall include mediation, provided a mediator can be appointed by agreement of the parties or by an appropriate agency of the state. If a mediator is appointed, his function shall be to assist all parties to reach a voluntary agreement. He may hold separate or joint conferences as he deems expedient to effect a voluntary, amicable, and expeditious adjustment and settlement of the differences and issues between the parties. He shall make no public recommendation on any negotiation issue in connection with the performance of his service nor shall he make a public statement or report which evaluates the relative merits of the position of the parties. The mediator,

may, however, recommend or suggest to the parties any proposal or procedure which in his judgment might lead to settlement.

Arbitration

Sec. 10. (a) The request for arbitration referred to in Section 9 hereof shall be initiated within five days following the expiration of the 60-day pre-impasse period or within five days following an agreed extension of the period, as provided in Section 9. If both parties elect to settle their dispute by arbitration, such election shall be made within five days following the request for arbitration, and shall be in the form of a written agreement to arbitrate. The issues to be arbitrated shall be all matters which the parties have been unable to resolve through collective bargaining in accordance with the procedures of Sections 7 and 9 of this Act.

(b) Although the policy of this Act favors and encourages the parties to elect voluntary arbitration, nothing contained herein shall be deemed a requirement of compulsory arbitration.

Arbitration board

Sec. 11. If the parties elect arbitration, within five days following the execution of the agreement to arbitrate they shall select and name one arbitrator and shall immediately notify each other in writing of the name and address of the person so selected. The two arbitrators so selected and named shall, within 10 days from the execution of the agreement to arbitrate, attempt to agree upon a third (neutral) arbitrator. If on the expiration of the said 10-day period the two arbitrators have been unable to agree upon the

selection of the third arbitrator, either party may request the American Arbitration Association to utilize its procedures for selection of the neutral arbitrator, and said association shall be authorized to effect the appointment of the neutral arbitrator according to fair and regular procedures. Unless both parties consent, the neutral arbitrator so selected will not be the same person selected as a mediator pursuant to Section 9 hereof. The third (neutral) arbitrator, whether selected as a result of agreement between the two arbitrators previously selected or selected pursuant to American Arbitration Association procedures, shall serve as chairman of the arbitration board.

Hearings

Sec. 12. (a) The arbitration board shall, acting through its chairman, call a hearing to be held within 10 days after the date of the appointment of the chairman; and the board shall, acting through its chairman, give the other two arbitrators, the association, and the public employer at least seven days' notice in writing of the time and place of such hearing. The hearing shall be informal, and the rules of evidence prevailing in judicial proceedings shall not be binding. Any and all documentary evidence and other data deemed relevant by the arbitrators may be received in evidence. The arbitrators shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of books, records, and other evidence relative or pertinent to any issue presented to them for determination.

(b) The hearing conducted by the arbitration board shall be concluded within 20 days of the time of commencement; within 10 days after the conclusion of the hearing the arbitration board shall make written findings, in accordance with Section 12 of this Act, and render a written award on the issues presented. A copy of the findings and award shall be mailed or otherwise delivered to the association and to the public employer.

(c) Time periods specified in this section may be extended for reasonable periods by written agreement of the parties. Time periods may also be extended, for good cause, by the arbitration board, provided the cumulative period of the extensions granted by the board shall not exceed 20 days.

Scope of the arbitrator's authority, effect of the award, and enforceability

Sec. 13. (a) It shall be the duty of the arbitration board to render an award in accordance with the requirements of Section 4 of this Act. Accordingly, hazards of employment, physical qualifications, educational qualifications, mental qualifications, job training, and skills are factors, among others, which the arbitrators shall consider in settling disputes relating to wages, hours, and other terms and conditions of employment.

(b) When an arbitration award is rendered in accordance with these provisions, the public employer involved shall be deemed to be in compliance with the requirements of Section 4 hereof as to the terms and conditions provided by said award for the duration of the collective bargaining period for which the award is applicable.

(c) A majority decision of the arbitration board, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or the arbitration board, in the state district court for the judicial district in which a majority of the affected employees reside.

(d) The commencement of a new fiscal year following the initiation of arbitration procedures under this Act, but prior to the rendition of the arbitration award or its enforcement, shall not render a dispute moot or otherwise impair the jurisdiction or authority of the arbitration board or its award. Increases in rate of compensation awarded by the arbitration board under this section may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since initiation of arbitration procedures under this Act, the foregoing limitation shall be inapplicable and such awarded increases may be retroactive to the commencement of such fiscal year, any other statute or charter provision to the contrary notwithstanding.

(e) The parties may amend or modify an arbitration award by agreement in writing at any time.

Judicial review of the arbitration award

Sec. 14. Awards of the arbitration board shall be reviewable by the state district court for the judicial district in which the municipality is located, but only on the following grounds: (1) that the arbitration panel was without or exceeded its jurisdiction; (2) that the order is unsupported by competent material, and substantial evidence on the whole record; or (3) that the order was procured by fraud, collusion, or other such unlawful means. The pendency of a proceeding for review shall not automatically stay the order of the arbitration board.

Compensation of arbitrators and expenses

Sec. 15. The compensation, if any, of the arbitrator appointed for the firefighters and/or policemen shall be paid by the association representing the firefighters and/or policemen. The compensation of the arbitrator appointed for the public employer shall be paid by the public employer. The compensation of the neutral arbitrator, as well as all stenographic and other expenses incurred by the arbitration board in connection with the arbitration proceedings, shall be paid jointly in even proportions by the association representing the firefighters and/or the policemen and the public employer. If either party in the arbitration requires a transcript of the arbitration requires a transcript of the arbitration proceedings that party shall be required to bear the cost of the transcript.

Appendix B

Judicial enforcement when the public employer declines to arbitrate

Sec. 16. Should a public employer choose not to elect arbitration when arbitration has been requested by an association pursuant to Sections 9, 10, and 11 hereof, on the application of the association, the state district court of the judicial district in which a majority of the affected employees reside shall have full power, authority, and jurisdiction to enforce the requirements of Section 4 hereof as to any unsettled issue relating to compensation and/or other terms and conditions of employment for firefighters and/or policemen. The court costs of any such action, including costs for a master if one is appointed, shall be taxed against the public employer. In the event the court finds the public employer in violation of Section 4 hereof, it shall: (1) order the public employer to make the affected firefighters and/or policemen whole as to their past losses; (2) declare the compensation and/or other terms and conditions of employment required by Section 4 hereof for the period as to which the parties had been bargaining, but not to exceed a period of one year, and (3) award the employees' association reasonable attorney's fees.

Strikes and lockouts

Sec. 17. (a) Strikes, lockouts, work stoppages, and slowdowns of firefighters and/or policemen shall be unlawful, and they are hereby prohibited.

(b) In the case of a lockout of firefighters or policemen by a municipality, or its designated representative or agent, or a department or agency head, the Court shall (i) issue an order restraining and enjoining such violation, and/or (ii) impose on any individual violator a fine of not more than $2,000.

Appendix B

(c) Upon the finding by the district court in which the municipality is located that a fire or police service association has called, ordered, aided, or abetted in a strike of firefighters or policemen, the Court shall impose upon such employee organization, for each day of such violation a fine fixed in an amount equal to 1/26 of the total amount of annual membership dues of such association or $20,000, whichever is the lesser; provided, however, that where an amount equal to 1/26 of the total amount of annual membership dues of such employee organization is less than $2,500, such fine shall be fixed in the amount of $2,500. In addition, the Court shall order forfeiture of any membership dues checkoff for a specified period of time not to exceed 12 months. If, however, the association alleges, and the Court finds, that the appropriate municipality or its representatives engaged in such acts of extreme provocation as to or its representatives engaged in such acts or extreme provocation as to detract substantially from the responsibility of the association for the strike, the Court may, in its discretion, reduce the amount of the fine imposed.

(d) If an association appeals a fine imposed pursuant to the preceding paragraph, such employee organization shall not be required to pay such fine until such appeal is finally determined.

(e) If a firefighter or policeman engages in a strike, or interferes with the municipality, or prevents the municipality from engaging in its duty, or commits, attempts or directs any employee of the municipality to stop or decline to work, or slowdown work, or causes any other person to fail or refuse to deliver to the municipality goods or services, or pickets for any of the above illegal acts, or conspires to perform any of the above acts, the wages or compensation in any form of such firefighter or policeman shall not increase in any manner or form, until after the expiration of one year from the date such firefighter or policeman resumes normal working duties, and said firefighter or policeman shall be on probation for two years with respect to civil service

status, tenure of employment or contract of employment, which that person may have theretofore been entitled.

Judicial enforcement generally

Sec. 18. The state district court of the judicial district in which the municipality is located, and any judge thereof, shall have full power, authority, and jurisdiction, on the application of either party aggrieved by an action or omission of the other party, when such action or omission pertains to the rights, duties, or obligations provided in this Act, to issue any and all proper restraining orders, temporary or permanent injunctions, and any other and further writ, order, or process, including but not limited to contempt orders, that are appropriate to carrying out and enforcing the provisions of this Act.

Severability

Sec. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

Act takes precedence

Sec. 20. (a) This Act shall supersede all conflicting provisions in previous statutes concerning this subject matter; to the extent of any conflict the previous conflicting statutory provision is hereby repealed; and this Act shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the state or by any of its political subdivisions or agents, such as, but not limited to, a personnel board, a civil service commission, or a home-rule municipality.

(b) Provisions of collective bargaining contracts made pursuant to this Act shall take precedence over state or local civil service provisions whenever the collective bargaining contract, by agreement of the parties, specifically so provides. Otherwise, the civil service provisions shall prevail. Civil service provisions, however, shall not be repealed or modified by arbitration or judicial action; although arbitrators and courts, where appropriate, may interpret and/or enforce civil service provisions.

(c) Nothing contained in this Act shall be construed as repealing any existing benefit provided by statute or ordinance concerning firefighters' or policemen's salaries, pensions, or retirement plans, hours of work, conditions of work, or other emoluments; this Act shall be cumulative and in addition to the benefits provided by said statutes and ordinances.

(d) Nothing contained in this Act shall be deemed a limitation on the authority of a fire chief or police chief of a city under Chapter 325, Acts of the 50th Legislature, 1947 (Article 1269m, Vernon's Texas Civil Statutes), except to the extent the parties through collective bargaining shall agree to modify such authority.

No. 92-1

In The Supreme Court of the United States

October Term, 1992

Lynwood Moreau, *et al.*,
Petitioners,

v.

Johnny Klevenhagen, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

Michael T. Leibig
Counsel of Record
Zwerdling, Paul, Leibig, Kahn, Thompson & Driesen
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000
Attorney for Petitioners

Harold M. Streicher
Counsel of Record
Assistant County Attorney
Murray E. Malakoff
Assistant Harris County Attorney
1001 Preston, Ste. 634
Houston, Texas 77002-1891
(713) 755-7164
Attorney for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 29, 1992
CERTIORARI GRANTED OCTOBER 5, 1992

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H-88-1298

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
4/15/88	1	Complaint for Declaratory Judgment, Overtime Pay, Liquidated Damages and Other Relief Under the Fair Labor Standards Act
5/31/88	5	Defendants' Original Answer
4/11/89	11	Plaintiffs' Motion for Partial Summary Judgment
4/11/89	12	Memorandum in Support of Plaintiffs' Motion For Partial Summary Judgment
4/11/89	13	Statement of Facts Not in Dispute
6/8/89	16	Defendant's Motion for Summary Judgment Or Alternative Motion for Partial Summary Judgment
6/9/89	17	Defendants' Response to Plaintiffs' Motion For Partial Summary Judgment
6/9/89	18	Defendants' Statement of Facts
8/24/89	21	Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment and in Response to Plaintiff's Motion for Partial Summary Judgment
10/16/89	23	Plaintiffs' Response to Defendants' Motion for Summary Judgment
9/5/90	25	Memorandum & Order
9/5/90	26	Final Judgment
9/25/90	27	Plaintiff's Notice of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case Number 90-2833

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/25/90	Notice of Appeal
1/11/91	Brief of Appellant
3/18/91	Brief of Appellee
4/1/91	Reply Brief of Appellant
2/4/92	Case Argued
3/31/92	Opinion Rendered

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR. Individually, as President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO, and as FLSA REPRESENTATIVE of 37 Consenting Similarly Situated Consenting Harris County Law Enforcement Officers; 706 Fawn Drive Houston, TX 77015

THE HARRIS COUNTY DEPUTY SHERIFF'S UNION, LOCAL 154 IUPA, AFL-CIO on its own behalf, and as an FLSA representative of the 400 Deputy Sheriffs it represents; 12751 Woodforest, Houston, TX 77015

HARRIS COUNTY SHERIFFS (CORPORAL AND SERGEANTS)

1. DANIEL ALMENDAREZ (Corporal)
428 Hoffman
Houston, TX 77020

2. L.V. MOREAU (Sergeant)
222 E. 2nd
Deer Park, TX 77536

3. THURMAN T. TYNDALL (Sergeant)
1509 Coolidge Drive
Deer Park, TX 77536

HARRIS COUNTY DEPUTY SHERIFFS

1. JERON MCNELL BARNETT SR.
22820 Imperial Valley Dr., #110
Houston, TX 77073

2. HUMBERTO RIOS BARRERA
2537 Priest
Houston, TX 77093

3. BRADLEY T. BENNETT
5907 Sunny Gate
Spring, TX 77373

4. ALTON W. BOWDOIN
62 Evanston #3
Houston, TX 77015

5. BRUCE BRECKENRIDGE
20070 N. Navaho Trail
Katy, TX 77449

6. CHUCK CALVIT
20127 Lions Gate
Humble, TX 77338

7. PAUL STEVEN CORDOVA
17715 Wayforest Dr. #305
Houston, TX 77060

8. NELDA DELACRUZ
7302 Alabonson #101
Houston, TX 77088

9. CHRIS E. DEMPSEY
13923 Kensington Pl.
Houston, TX 77034

10. JAMES DEWEY
1301 Wesley
Deer Park, TX 77536

11. RAY A. DUPONT
20115 Lionsgate
Humble, TX

12. VINCENT A. GONZALES
12735 La Bele Ln.
Houston, TX 77015

13. P.R. HALFIN, JR.
10939 West Road #1306
Houston, TX 77064

14. JAMES H. HAPPEL
323 Haymarket
Houston, TX 77015

15. MONA F. HAWK
20515 Blue Beech Dr.
Katy, TX 77445

16. VERNON SCOTT LEMONS JR.
2811 Dedman
Pasadena, TX 77503

17. DAVID LOPEZ
7503 Log Cradle Dr.
Houston, TX 77041

18. LEONEL MARTINEZ
13706 Woodriver
Houston, TX 77085

19. JOE CLINTON MAYES
905 Cypress Station Rd. #B-2
Houston, TX 77090

20. JAMES KEVIN MCGEHEE
310 Paramatta
Houston, TX 77073

21. MARTY M. MINGO
6437 Dryad #971
Houston, TX 77035

22. DIANE L. MIRELES
7219 Skybright Ln.
Houston, TX 77095

23. JOE A. MUNOZ
10110 Sagegate
Houston, TX 77085

24. LARRY POHLMEYER
695 Normandy #183
Houston, TX 77015

25. CARLOS M. RAMIREZ
4711 Wiley Rd.
Houston, TX 77093

26. JAMES A. REED
248 Harkness
Houston, TX 77076

27. JAMES A. REDD
8102 Streamside
Houston, TX 77088

28. R'WANDA SAMPSON
8404 S. Coursa #603
Houston, TX 77088

29. MICHAEL WAYNE SIMPSON
14,506 Roondstone
Houston, TX 77015

30. JAMES W. SIMS
16945 Ave B
Channelview, TX 77530

31. TERRY STOLITZA
3339 Maymist
Katy, TX 77449

32. WALTER L. WALKER
2475 Gray Falls Dr. #402
Houston, TX 77077

33. ROGER D. WEDGEWORTH
23210 Brightstar
Spring, TX 77373,

Plaintiffs,

v.

JOHNNY KLEVENHAGEN as Sheriff of
Harris County, Texas,
1301 Franklin Street
Houston, TX 77002

and

JUDGE JON LINDSAY
Commissioners Court
1001 Preston
9th Floor
Houston, TX 77002,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT, OVERTIME PAY, LIQUIDATED DAMAGES AND OTHER RELIEF UNDER THE FAIR LABOR STANDARDS ACT

[Filed Apr. 15, 1988]

I. INTRODUCTION.

1. This action is brought by Eugene T. Merritt, Jr. individually, as President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO (hereafter Local 154) and as Fair Labor Standards Act (hereafter FLSA) representative of other consenting parties under FLSA Sec. 216, 29 U.S.C. Sec. 206(b); by 37 additional Harris County, Texas law enforcement officers; and by Local 154 on behalf of 400 deputy sheriffs and in the local union's capacity as FLSA representatives.

2. Plaintiffs bring this action for a declaratory judgment that the defendants have willfully and wrongfully violated their statutory obligations, and to recover back wages and liquidated damages in an equal amount from the Harris County Sheriff's Department for violations of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Sec. 201, *et seq.*

Defendants' violations include: the institution and operation of a compensatory time system after April 15, 1986, absent an agreement with the duly designated representative of employees involved; unilateral adjustments in the administrative regulations and application of rules

controlling plaintiffs' wages or fringe benefits; a failure to keep proper records as required by FLSA; failure to correctly calculate plaintiffs' "regular rates" of pay for the purposes of FLSA; failure to correctly calculate the FLSA "hours worked" of officers assigned to K-9, mounted, motorcycle, and other special duty units; failure to pay plaintiffs fully for training activities; failure to pay plaintiffs fully for travel time; failure to pay plaintiffs fully for standby time which cannot be used effectively for personal purposes; failure to pay plaintiffs fully for court time; and improper calculations for FLSA overtime entitlement.

II. JURISDICTION.

3. Jurisdiction of this action is conferred on this Court by U.S.C. Sec. 216(b) and 28 U.S.C. Secs. 1331, 1337. Declaratory relief is authorized under 28 U.S.C. Secs. 2201, 2202.

4. Venue for this action lies in this Court pursuant to 28 U.S.C. Sec. 1391(b).

III. PARTIES.

5. Each of the 37 individual plaintiffs is an adult resident citizen of Texas, employed as a law enforcement officer by the Sheriff's Department of Harris County, Texas. As shown by the written consent of each individual plaintiff attached to this Complaint as Exhibit A, each of the individual plaintiffs has consented to become a party in this cause pursuant to the provisions of 29 U.S.C. Sec. 203(e), and Sec. 206(b).

6. Plaintiff E.T. Merritt is a law enforcement officer employed by Harris County, is President of Local 154, and has been designated FLSA representative by the members of Local 154.

7. Local 154 is a fraternal, non-profit labor organization which represents law enforcement officers employed

by the Harris County Sheriff's Department in employment matters. Local 154 is the FLSA representative of 400 Harris County law enforcement officer members, including the 37 consenting plaintiffs.

8. Section 2 of the FLSA Amendments of 1985, 29 U.S.C. Sec. 207, for the first time gave representational status for FLSA purposes to organizations by requiring that a public agency may, in lieu of the otherwise mandated overtime compensation, pay its employees compensatory time off at a rate of not less than one and one-half for each hour of employment, but only under an agreement or understanding arrived at between the employee representative of the employees involved where such a representative has been designated. While not a formal or recognized bargaining agent, Local 154 has been designated by the 400 employees involved, and thus is a representative within the meaning of 29 U.S.C. Sec. 207(o)(2)(A) and 29 C.F.R. Sec. 553.23.

9. Defendant Johnny Klevenhagen is the Sheriff of Harris County, Texas.*

10. Defendant Harris County, Texas, is a political subdivision organized and existing under the laws of the State of Texas. Harris County is, and at all relevant times has been, the employer of each of the individual plaintiffs. The Harris County Sheriff's Department is the operating law enforcement agency of Harris County.**

11. The Harris County Sheriff's Department is an employer within the meaning of 29 U.S.C. Sec. 203(d).

12. No state or local law eliminates Harris County's authority to establish a compensatory time agreement under the FLSA and the United States Department of Labor, Wage and Hour Regulation, 29 C.F.R. Part 553,

---

* Serve at: 1301 Franklin Street, Houston, Texas 77002.

** Serve at: Jon Lindsay, 1001 Preston, 9th Floor, Houston, Texas 77002.

Vol. 51, No. 75, *Fed. Reg.* 13403, paragraph (2) under Summary of Rules (April 18, 1986).

IV. FACTS.

13. As set forth in each of the separate claims below, the defendants and their officers and agencies have violated, and continue to violate, the provisions of the FLSA by failing and refusing in a willful and intentional manner, since April, 1986, to pay plaintiffs, and their other employees similarly situated, wages due them under the FLSA and its implementing regulations. Defendants have further failed to keep records required by the FLSA.

14. The Fair Labor Standards Act was amended in 1974 to cover virtually all state and local government activities. Those amendments were challenged as unconstitutional, and in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the United States Supreme Court held them to be unconstitutional. On February 19, 1985, the Supreme Court reversed itself, and in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), held that the FLSA does apply to all state and local government employees. That decision had the immediate impact of rendering illegal many of the standing wage and hour policies of the Harris County Sheriff's Department, including its use of compensatory time, its calculation of overtime entitlement, and its record keeping.

15. On November 13, 1985, the Fair Labor Standards Amendments of 1985 (Pub. Law 99-150) were enacted. The amendments responded to many concerns raised in police administration by including special provisions in the FLSA which apply only to state and local employees.

16. During the period between the February, 1985, *Garcia* decision and April 15, 1986, wage and hour administration within the Harris County Sheriff's Department was confused.

17. Neither prior to nor during April, 1986, did the Harris County Sheriff's Department take all of the necessary steps to comply with the new amendments.

18. At no time prior to or since April, 1986, has the Harris County Sheriff's Department instituted a time and attendance record keeping system designed to record all work time within the meaning the FLSA.

19. Law enforcement officers within the Department devote "off the record" work time to the Department which the Department does not record. Informal arrangements are not rare.

20. The Department has unlawfully calculated the FLSA "regular rate."

21. The Department excludes from FLSA "hours worked" considerable numbers of hours it "suffers and permits," and in many cases mandates its officers assigned to K-9, mounted, motorcycle, and other similar duties to work.

22. The Department unlawfully excludes from FLSA "hours worked" certain travel time, court time, and training time, including certain firearms training. Exhibit B.

23. The Department has unilaterally imposed a system of compensatory time in lieu of overtime payments which is administered at the discretion of the Sheriff's Department. This system was designed and implemented without an agreement with the employees' designated representative Local 154.

24. Plaintiffs and plaintiffs' attorneys have outlined their objections to the Department's policies under FLSA. Plaintiffs have objected to the practices regarding compensatory time, exclusion of incentive pay from FLSA "regular rates" of pay, recordkeeping procedures, the exclusion from FLSA hours worked hours spent working

by officers assigned to K-9, mounted, motorcycle, and other similar duties, and other practices prohibited by FLSA. The Sheriff's Department has received copies of Department of Labor (DOL) opinions on the subjects of exemptions of Sergeants, Incentive Pay, and K-9 and Special Units. The Sheriff's Department has also been made aware of the series of cases (with no contrary authority) which have held similarly situated defendants in violation of FLSA and which have rejected arguments identical to those the Sheriff's Department has been making, and of a letter from the Legislative sponsors of the 1985 Wage and Hour Amendments to DOL Secretary Brock which unambiguously supports plaintiffs' position. Exhibits C and D.

25. The Sheriff's Department and the County have consistently refused to meet with plaintiffs' representatives. The County does not recognize any FLSA representatives of plaintiffs. In spite of extensive efforts to gain a cooperative solution to the problem, the defendants have indicated that they will not comply on these issues absent enforcement action.

26. On October 7, 1986, plaintiffs filed a Complaint regarding the above practices with the United States Department of Labor, Wage and Hour Division. This Complaint raised all the issues discussed herein. Exhibit E.

27. The United States Department of Labor investigators in Texas investigated the Complaint and reported their initial findings of violations of the FLSA to defendants and to the Department of Labor headquarters in Washington, D.C.

28. The Department of Labor case remains in an "action pending" status as of April 15, 1988, the second anniversary of the effective enforcement date of the FLSA 1985 Amendments.

CAUSE OF ACTION

29. The foregoing conduct of the defendants is in violation of the rights of the plaintiffs under the Fair Labor Standards Act of 1938, as amended.

V. RELIEF

WHEREFORE, the plaintiffs, pray that this Court:

A. Order defendants, under the supervision of plaintiffs' counsel or their designated agents or representatives, to make a complete and accurate accounting of all the overtime compensation due to each plaintiff;

B. Enter a declaratory judgment declaring that the defendants have willfully and wrongfully violated their statutory obligations and deprived the plaintiffs of their entitlement under the law, as alleged herein;

C. Enter a judgment under Section 216 of the FLSA against defendants for all sums found due to each plaintiff in overtime compensation;

D. Award each plaintiff monetary damages in the form of overtime compensation and liquidated damages equal to their unpaid overtime compensation plus interest;

E. Award plaintiffs their reasonable attorney's fees to be paid by defendants, and the costs and disbursements of this action; and

F. Grant such other relief as may be just and proper.

Respectfully submitted,

/s/ Michael T. Leibig
MICHAEL T. LEIBIG
ZWERDLING, PAUL, LEIBIG, KAHN AND THOMPSON, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, DC 20036
(202) 857-5000

/s/ Richard H. Cobb
RICHARD H. COBB
1445 North Loop West, Suite 915
Houston, Texas 77008
(713) 864-1327
Federal Admission #1695

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

DEFENDANTS' ORIGINAL ANSWER

[Filed May 31, 1988]

Johnny Klevenhagen and Harris County, Texas, Defendants, file this their Original Answer to Plaintiffs' Original Complaint (the Complaint) and by way of such answer would show to the Court the following:

I.

INTRODUCTION

1. Defendants admit that Eugene T. Merritt, Jr. is the President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO. Defendants specifically deny that Mr. Merritt or the Harris County Deputy Sheriff's Union is the Fair Labor Standards Act Representative of other consenting parties under the Fair Labor Standards Act § 216, 29 U.S.C. § 206(b). Defendants specifically deny that Local 154 is the officially designated FLSA Representative of 400 deputy sheriffs as alleged, and/or that it can bring this action and act in the capacity as Fair Labor Standards Act Representative of these 400 unnamed deputy sheriffs.

2. Defendants admit that Plaintiffs seek a declaratory judgment and seek to recover back wages and liquidated damages, but deny that Plaintiffs are entitled to such relief. Defendants deny that they violated the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, and further deny that any of the alleged violations were either willful or wrongful. All remaining allegations in Paragraph No. 2 of the Complaint are denied.

II.

JURISDICTION

3. Defendants admit that this Court has jurisdiction of this action under 29 U.S.C. § 216(b) and 28 U.S.C. §§ 1331, 1337. Defendants also admit that declaratory relief is authorized under 28 U.S.C. §§ 2201, 2202, but deny Plaintiffs are entitled to such relief.

4. Defendants admit that venue for this action lies in this Court pursuant to 28 U.S.C. § 1391(b).

III.

PARTIES

5. Defendants admit that the 37 individuals listed as Plaintiffs are adult resident citizens of Texas and are employed as law enforcement officers by the Sheriff's Department of Harris County, Texas. Defendants also admit that Exhibit A, attached to the Complaint purports to state that each of these individuals has consented to become a party in this case. Defendants deny that these forms are a consent to become a party pursuant to provisions of 29 U.S.C. § 203(e) and § 206(b).

6. Defendants admit that Plaintiff E. T. Merritt is a law enforcement officer employed by Harris County and is the President of Local 154. Defendants deny the remaining allegations in Paragraph 6 of the Complaint.

7. Defendants admit that Local 154 is a labor organization, and that it purports to represent officers employed by the Harris County Sheriff's Department in employment matters. Defendants deny, however, that Local 154 is the only organization which purports to represent officers in such matters. Defendants deny that Local 154 is, for the period relevant to this action, the Fair Labor Standards Act Representative of the officers of the Harris County Sheriff's Department. Defendants are unable to admit or deny whether Local 154 has 400 Harris County law enforcement officer members including the 32 individual Plaintiffs. Defendants deny the remaining allegations in Paragraph 7 of the Complaint.

8. Defendants admit that Local 154 is not a formal or recognized bargaining agent. Defendants deny the remaining allegations in Paragraph 8 of the Complaint.

9. Defendants admit that Johnny Klevenhagen is the Sheriff of Harris County, Texas.

10. Defendants admit that Harris County, Texas, is a political subdivision organized and existing under the laws of the State of Texas. Defendants deny the remaining allegations in Paragraph 10 of the Complaint.

11. Defendants deny the allegations in Paragraph 11 of the Complaint.

12. Defendants admit the allegations in Paragraph 12 of the Complaint.

IV.

FACTS

13. Defendants deny the allegations in Paragraph 13 of the Complaint.

14. Defendants deny the allegations in Paragraph 14 of the Complaint.

15. Defendants admit the first sentence of Paragraph 15 of the Complaint. Defendants deny the remaining allegations in Paragraph 15 of the Complaint.

16. Defendants deny the allegations in Paragraph 16 of the Complaint.

17. Defendants deny the allegations in Paragraph 17 of the Complaint.

18. Defendants deny the allegations in Paragraph 18 of the Complaint.

19. Defendants deny the allegations in Paragraph 19 of the Complaint.

20. Defendants deny the allegations in Paragraph 20 of the Complaint.

21. Defendants deny the allegations in Paragraph 21 of the Complaint.

22. Defendants admit that it excludes from "hours worked" time spent in firearms requalification outlined in Exhibit B to Plaintiffs Complaint. Defendants deny the remaining allegations in Paragraph 22 of the Complaint.

23. Defendants deny the allegations in Paragraph 23 of the Complaint.

24. Defendants are without information to admit or deny the allegations in Paragraph 24 of the Complaint.

25. Defendants deny that the Sheriff's Department and the County have refused to meet with Local 154. Defendants admit that it does not recognize any organization as the "FLSA Representative of Plaintiffs." Defendants deny the remaining allegations in Paragraph 25 of the Complaint.

26. Defendants admit that Exhibit E to Plaintiffs' Complaint is a complaint to the Department of Labor, Wage and Hour Division. Defendants deny the remaining allegations in Paragraph 26 of the Plaintiffs' Complaint.

27. Defendants are without information to admit or deny the allegations in Paragraph 27 of the Complaint.

28. Defendants are without information to admit or deny the allegations in Paragraph 28 of the Complaint.

CAUSE OF ACTION

29. Defendants deny the allegations in Paragraph 29 of the Complaint.

V. Relief

Defendants deny that Plaintiffs are entitled to any of the relief requested in their Complaint.

FIRST AFFIRMATIVE DEFENSE

The allegations contained in Plaintiffs' Complaint are barred in whole or in part by laches.

SECOND AFFIRMATIVE DEFENSE

The allegations contained in Plaintiffs' Complaint are barred in whole or in part by limitations.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs by their actions have waived in whole or in part any complaint they may have under the Fair Labor Standards Act.

FOURTH AFFIRMATIVE DEFENSE

Defendants specifically deny that Plaintiffs Merritt and Local 154 or any of the other individual Defendants have the authority to sue in a representative capacity or on behalf of all members of Local 154. Local 154 is not a proper party plaintiff in this action.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs' Original Complaint be dismissed, that Plaintiffs be denied all relief sought, that judgment be entered in favor of Defendants, that Defendants recover all costs of court and attorney's fees, and that De-

fendants have such other and further relief to which they may show themselves justly entitled.

Of Counsel:

MIKE DRISCOLL
Harris County Attorney
Harris County, Texas

/s/ Ann Hardy
Attorney-in-Charge
Admissions ID No. 3231
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7869

LUPE SALINAS
Admissions ID No. 4105
Assistant County Attorney
1001 Preston, Suite 634
Houston, TX 77002
(713) 221-5101

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

STATEMENT OF FACTS NOT IN DISPUTE

[Filed Apr. 11, 1989]

I. JURISDICTION AND PARTIES

1. This court has jurisdiction of this action under 29 U.S.C. § 216(b) and 28 U.S.C. §§ 1331 and 1337. Declaratory relief is authorized under 28 U.S.C. §§ 2201 and 2202. Complaint Para. 3; Answer Para. 3.

2. Venue for this action lies in this Court pursuant to 28 U.S.C. § 1391(b). Complaint Para. 4; Answer Para. 4.

3. The 37 individual plaintiffs listed on the caption of the Complaint are adult resident citizens of Texas and are employed as law enforcement officers in the Harris County Sheriff's Department by Harris County, Texas. Exhibit A to plaintiffs' Complaint states that these individual plaintiffs consented to become parties in this case. Complaint Para. 5; Answer Para. 5.

4. On February 10, 1989, this court granted plaintiffs' Motion to join as plaintiffs an additional 76 officers,

all of whom are also adult resident citizens of Texas and are employed as law enforcement officers in the Harris County Sheriff's Department by Harris County, Texas. Filed with plaintiffs' Motion were consent forms for each of these additional plaintiffs, stating that each additional officer consented to become a party in this case.

5. Plaintiff E. T. Merritt is a law enforcement officer employed by Harris County and is the President of the Harris County Deputy Sheriff's Union, Local 154, AFL-CIO (Local 154). Complaint Para. 6; Answer Para. 6.

6. Local 154 is a labor organization which represents officers, including plaintiffs employed by the Harris County Sheriff's Department in employment matters. Complaint Para. 7; Answer Para. 7. Local 154, is not an exclusive collective bargaining agent.

7. In addition to Local 154, the following other employee organizations act as representatives of officers: the support union of the Harris County Sheriff's Union, Local 171; the Afro-American Sheriff Deputies League; and the Mexican-American Sheriff's Association. Defendants' Answer to Plaintiffs' Interrogatories, No. 20.

8. Defendant Johnny Klevenhagen is the Sheriff of Harris County, Texas. Complaint Para. 9; Answer Para. 9.

9. Defendant Harris County, Texas is a political subdivision organized under the laws of the state of Texas. Harris County is, and at all relevant times has been, the employer of each of the individual plaintiffs. The Harris County Sheriff's Department (Sheriff's Department) is the operating law enforcement agency of Harris County. Harris County is an employer within the meaning of 29 U.S.C. § 203(d).

10. No state or local law eliminates Harris County's authority to establish a compensatory time agreement under the Fair Labor Standards Act (FLSA) and the

United States Department of Labor Wage and Hour Regulation 29 C.F.R. Part 553, Vol. 51, No. 75 Fed. Reg. 13403; para. 2 under Summary of Rules (April 18, 1986). Complaint para. 12; Answer Para. 12.

II. COMPENSATORY TIME AND EMPLOYEE REPRESENTATION

11. The Sheriff's Department compensates plaintiffs pursuant to a pay system under which compensatory time off (comp time) may be used in lieu of cash for overtime. Harris County Personnel Regulations § 7.02 ("In lieu of payment for overtime work, compensatory time may be allowed").

12. Defendants have not selected an alternative pay period pursuant to FLSA § 7(k), and therefore plaintiffs are entitled to overtime compensation for each and every 7 day pay period in which they work over 40 hours. Defendants' Answer to Plaintiffs' Interrogatory 10.

13. Defendants' pay system which provides for comp time in lieu of cash overtime was instituted and has been maintained without an agreement or memorandum of understanding with Local 154.

14. Each plaintiff has designated Local 154 as his or her FLSA representative. Each plaintiff signed a consent form which contains the following paragraph: "I have authorized the Harris County Deputy Sheriff's Union to represent me in all FLSA matters." See Exhibit A to plaintiffs' Complaint.

15. Local 154 has acted as a representative for its members in employment matters including matters in which Harris County employs the plaintiffs, for over 5 years. It has had an arrangement with Harris County which provided for dues check-off for its members for over 5 years. Harris County and its officials have regularly worked with Local 154's leadership in situations in

which the local has represented its members with the Sheriff's Department.

16. Local 154, through its attorneys and/or officers, communicated its desire to reach an agreement concerning defendants' use of compensatory time to defendants and/or defendants' attorney, the County Attorney, in July 1986. See Exhibit E to plaintiffs' Complaint.

17. No such agreement has been reached with Local 154, and defendants do not have a comp time agreement with any organization. See Answer Para. 25.

18. Exhibit E to plaintiffs' Complaint is a Complaint to the Department of Labor, Wage and Hour Division, dated October 3, 1986. Complaint, Para. 26; Answer, Para. 26.

III. REGULAR RATE

19. In the calculation of plaintiffs' "regular rate" of pay (the base rates from which the time-and-one-half overtime rates are calculated), longevity pay is excluded. Defendants' Answer to Plaintiffs' Interrogatory 12(G).

20. Defendants do not award flight incentive pay.

IV. EXCLUSION OF WORK TIME

21. Defendant excludes from their calculations of the "hours worked" by plaintiffs time spent in firearms requalification as outlined in Exhibit B to plaintiffs' Complaint. Complaint Para. 22 and Exhibit B; Answer Para. 22.

22. Texas law requires law enforcement officers' firearms qualification once a year. Harris County Sheriffs, including plaintiffs, are required to qualify twice a year.

23. No plaintiff works with a dog, or is assigned to mounted patrol. Defendants' Answer to plaintiffs' Interrogatories 12(F) and (H).

Respectfully submitted,

/s/ Michael T. Leibig
MICHAEL T. LEIBIG

/s/ Joseph E. Slater
JOSEPH E. SLATER
ZWERDLING, PAUL, LEIBIG, KAHN AND THOMPSON, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, DC 20036
(202) 857-5000

/s/ Richard H. Cobb
RICHARD H. COBB
1445 North Loop West, Suite 915
Houston, Texas 77008
(713) 864-1327

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*

v.

JOHNNY KLEVENHAGEN, *et al.*

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed Jun. 8, 1989]

COME NOW Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), moving for summary judgment, or, in the alternative, moving for partial summary judgment, pursuant to Rule 56, Fed. R.Civ.Proc., on the following grounds:

(1) *Brief Statement of the Case.*—Plaintiff Harris County Deputy Sheriff's Union, Local 154, AFL-CIO ("Union"), joined by individual Harris County deputies sheriff ("individual plaintiffs"), bring this suit for declaratory judgment against Sheriff Johnny Klevenhagen and Harris County, Texas. The basis of this litigation is Plaintiffs' belief that they are not properly compensated for their individual overtime, pursuant to the 1985 amendments to 29 U.S.C. 207(o) (Pub. Law. 99-150).

(2) Plaintiffs' complaint has failed to state a claim upon which relief may be granted.

(a) Payment of overtime compensation at one and one-half times Plaintiffs' individual overtime hours as compensatory time off is authorized by the Code of Federal Regulations promulgated by the U.S. Department of

Labor. Payment of overtime compensation at one and one-half times Plaintiffs' individual regular pay rate, in cash, after the Plaintiff has accumulated 240 hours of compensatory time off also is authorized by the U.S. Department of Labor's interpretations contained in the Code of Federal Regulations.

(b) County's calculation of "regular rates" of pay for purposes of cash overtime payments is authorized under U.S. Department of Labor interpretations and case law.

(c) County does not exclude basic or remedial firearms training from hours worked.

(d) County's overtime compensation policy was properly enacted and agreed upon by Plaintiffs. The compensation policy was enacted in December, 1985 and published in its revised personnel regulations handbook—more than seven months prior to Union's generalized communication to Defendants' counsel (See Exhibit "1", attached Personnel Regulations, Dec. 3, 1985, attached hereto; see also Complaint, Exhibit "E" reference to communication made to Defendants' counsel on July 8, 1986, that Union "was willing to reach an agreement in accordance with F.L.S.A.") Employment agreements, incorporating the provisions of the December, 1985 personnel regulations handbook, properly were entered into between Defendants and individual plaintiffs; no Plaintiff identified himself, personally or by representative's specific identification, that individual plaintiffs sought an agreement for overtime paid in cash in lieu of compensatory time off cash payments. (See Exhibit "2", attached affidavit of Defendant Sheriff; Exhibit "3", attached affidavit of C. J. Hrachovy). Union's generalized attempt to bargain for its unnamed employees, without identification of those employees, is an attempt at collective bargaining; such collective bargaining is not allowed under Texas

statutes, unless and until certain steps have been taken by Union and Harris County voters.

(e) Individual plaintiffs have waived their right to complain of County's overtime compensation policy.

(f) Individual plaintiffs are barred by the two-year statute of limitations from asserting claims against Defendants for payment in cash in lieu of compensatory time off.

(g) Defendants are not liable for liquidated damages to individual plaintiffs, as their actions were taken in "good faith."

WHEREFORE, Defendants pray that their motion for summary judgment be granted in all things; or, in the alternative, that they have partial summary judgment against Plaintiffs.

Respectfully submitted,

Of Counsel:
MIKE DRISCOLL
Harris County Attorney

/s/ Ann Hardy
ANN HARDY
Adm. Id. 3231
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7869
Attorney for Defendants

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*

v.

JOHNNY KLEVENHAGEN, *et al.*

DEFENDANTS' STATEMENT OF FACTS

[Filed Jun. 9, 1989]

Comes now Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), submitting this, their statement of facts which are not in dispute.

(1) Harris County, Texas is a political subdivision of the State of Texas.

(2) Johnny Klevenhagen is the elected, qualified and acting Sheriff of Harris County, Texas.

(3) Sheriff Klevenhagen has the power of appointment, under Texas statutes, or deputies sheriff serving in the jurisdiction of Harris County, Texas. Upon assuming office in January, 1985 and thereafter, Sheriff Klevenhagen appointed individual Plaintiffs as deputies sheriff.

(4) Sheriff Klevenhagen appoints deputies sheriff and has the formal control over such deputies sheriff, pursuant to Texas statutes.

(5) Sheriff Klevenhagen also is a "fee officer," under Texas statutes. Fees which the Sheriff collects are deposited into the Harris County treasury.

(6) Pursuant to Texas statutes, Harris County is required to pay compensation to deputies sheriff from Harris County funds.

(7) Harris County may not influence the selection of a particular deputy sheriff for appointment by the Sheriff.

(8) Harris County, through its Commissioners Court, is the budgetary authority for expenditures for elected officials, including the Sheriff. Appointments of deputies sheriff are approved by County as to availability of budgeted funds. The budgetary listing for funds allocated to the Sheriff is called "Sheriff's Department."

(9) Harris County has not entered into a collective bargaining agreement with any union, as no union has followed the procedures set forth in Texas statutes.

(10) Harris County, through its Commissioners Court, never was notified that particular deputies sheriff, by name, desired to enter into an agreement regarding the payment, in cash, for overtime hours accumulated.

(11) Effective December 7, 1985, Harris County reenacted its overtime compensation policy. Under that policy for non-exempt employees (such as individual plaintiffs), all hours worked over 40 per week, after April 15, 1985, were calculated at the rate of one and one-half times per hour, up to and including 240 hours (called "banked hours.") Thereafter, under the policy, non-exempt employees could take compensatory time off, subject to approval by the employee's supervisor. Such compensatory time off is deducted from the "banked hours." (Motion for Summary Judgment, Exhibit "1", §§ 7.01, 9.04).

(12) Beginning with the payroll period of April 16, 1986, all hours worked over 40 hours per week and

accumulated over the banked 240 hours were caculated at the rate of one and one-half times per hour and paid in cash at the employee's regular rate, called "base pay" on County Auditor payroll compensation forms. (Motion for Summary Judgment, Exhibit "2", attachments).

(13) Each employee, including individual plaintiffs, signed the County Auditor payroll compensation forms. The forms contained the provision that the signature of the employee evidenced that he or she had read, understood and accepted the terms and conditions of employment, as recited on the form and in the Harris County personnel regulations. (Motion for Summary Judgment, Exhibit "2", attachments).

(14) Harris County does not, and has no authority to, require deputies sheriff to qualify in firearms.

(15) In addition to the Sheriff, Constables have law enforcement duties. Of the eight elected constables in Harris County, at least three maintain law enforcement patrols.

(16) Harris County does not pay flight incentive pay, as neither it nor the Sheriff operate helicopters or airplanes.

(17) Harris County compensates training during duty hours as regular hours worked. (Defendants' ans. interrogs.).

(18) Individual plaintiffs' duty assignments, during the relevant times material to this litigation, included patrol, jailor and bailiff assignments.

(19) Other groups which purport to speak for Harris County deputies sheriff have identified themselves as the Harris County Deputy Sheriff's Association; the Support Union of the Harris County Sheriff's Union, Local 171; the Afro-American Sheriff Deputies League; the Mexican-American Sheriff's Organization; and (with other county

employees) the American Federation of State, County and Municipal Employees. (Defendants' ans. interrogs.).

Respectfully submitted,

Of Counsel:

MIKE DRISCOLL
Harris County Attorney

/s/ Ann Hardy
ANN HARDY
Adm. Id. 3231
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7869

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*

v.

JOHNNY KLEVENHAGEN, *et al.*

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed Jun. 9, 1989]

COME NOW Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), responding to Plaintiffs' Motion for Partial Summary Judgment, as follows:

Brief Statement of the Case

(1) Plaintiff Harris County Deputy Sheriff's Union, Local 154, AFL-CIO ("Union") is joined by individual Harris County deputies sheriff ("individual plaintiffs") for declaratory judgment against Sheriff Johnny Klevnhagen and Harris County, Texas. The basis of this litigation is Plaintiffs' belief that they are not properly compensated for their individual overtime, pursuant to the 1985 amendments to 29 U.S.C. § 207(o) (Pub. Law. 99-150). Plaintiffs have moved for partial summary judgment on several grounds: (1) Defendants' use of compensatory time without a proper 29 U.S.C. § 207(o) agreement; (2) Defendants' calculation of Plaintiffs' "regular rates" of pay for the purpose of computing overtime rates; and (3) Defendants' exclusion of those hours, from its hours worked calculations, which Plaintiffs spent in firearms training.

Response

(2) Payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate as compensatory time off is authorized by the Code of Federal Regulations promulgated by the U.S. Department of Labor. Payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate, in cash, after the individual plaintiff has accumulated 240 hours of compensatory time off also is authorized by the U.S. Department of Labor's interpretations contained in the Code of Federal Regulations. Longevity is not incentive pay and is properly is excluded from "regular rate."

(3) Plaintiff Union contends that: (1) Defendants policy of using compensatory time off and cash payments, after overtime of 240 hours are accumulated, was promulgated unilaterally after Union was designated as a representative of the individual plaintiffs; and (2) defendants have refused to bargain with Union as the individual plaintiffs' representative prior to instituting the overtime compensation policy. These contentions are not supported by the facts. Defendant County's overtime compensation policy was enacted in December, 1985 and published in its revised personnel regulations handbook—more than seven months prior to Union's generalized communication to Defendants' counsel (See Exhibit "1," Personnel Regulations, Dec. 3, 1985, attached to Defendants' Motion for Summary Judgment; see also Complaint, Exhibit "E" reference to communication made to Defendants' counsel on July 8, 1986, that Union "was willing to reach an agreement in accordance with F.L.S.A.") Employment agreements, incorporating the provisions of the December, 1985 personnel regulations handbook were entered into between Defendants and individual plaintiffs before work was begun and well before individual plaintiffs gave written authorization for Union to represent them. (See dates in Complaint Exhibit "A", Plaintiffs' individual "opt-in" authorization forms, and additional

authorization forms of additional plaintiffs attached to their Motion to File Consent Forms and to Add Plaintiffs)

(4) No individual plaintiff, personally or by representative, identified himself, by name, to Sheriff or others in County specifically to request that County's overtime compensatory time off and cash policy be recinded as to that Plaintiff in lieu of cash paid for overtime. By such actions, Plaintiffs have waived, and are barred by the two-year statute of limitations from asserting, their claims now.

(5) Time spent in basic certification and remedial firearms training courses offered at the Sheriff's Academy are not excluded from computations of overtime. Such courses are offered during duties' regular work hours.

(6) Defendants' actions were taken in "good faith," under the facts of this case.

Wherefore, Defendants pray that Plaintiffs' Motion for Partial Summary Judgment be denied.

Respectfully submitted,

Of Counsel:
MIKE DRISCOLL
Harris County Attorney

/s/ ANN HARDY
Adm. Id. 3231
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7869
Attorney for Defendants

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*

v.

JOHNNY KLEVENHAGEN, *et al.*

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed Aug. 24, 1989]

COME NOW Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), filing their memorandum of law in support of their Motion for Summary Judgment and in response to Plaintiffs' Motion for Partial Summary Judgment.

(1) *Standard for granting of summary judgment.*—Pursuant to Rule 56, Fed.R.Civ.Proc., this court must grant summary judgment when there is no genuine issue of material fact upon which reasonable minds could differ. *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rule 56 (c), Fed.R.Civ.Proc., "mandates entry to judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, —— U.S. ——, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The primary function of a motion for summary judgment, in the absence of disputed facts, is to show that one or more of the essential elements of a claim or defense is not in

doubt, "and that, as a result, judgment should be entered on the basis of pure legal considerations." *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986).

Defendants contend that Plaintiffs have failed to meet their burden of proof and, because of this, Plaintiffs' Motion for Partial Summary Judgment should be granted. In addition, because Defendants have met their burden of proof, Defendants' Motion for Summary Judgment should be granted.

(2) *Texas Statutes.*—Defendant Harris County is a political subdivision of the state of Texas; Defendant Sheriff is the elected, qualified and acting Sheriff of Harris County.

Under Texas statutes, Harris County is prohibited from entering into a collective bargaining contract with any labor organization when that agreement concerns wages, hours or conditions of employment. Art. 5154c, § 1 Vernon's Tex.Rev.Civ.Stat.Ann. The statute further declares that it is against public policy for any official or group of officials to "recognize a labor organization as the bargaining agent for any groups of public employees." Art. 5154c, § 2, Vernon's Tex.Rev.Civ.Stat.Ann. Any contract entered into with a labor organization concerning wages, hours or conditions of employment are declared null and void. Art. 5154c, § 1, Vernon's Tex.Rev.Civ.Stat.Ann. The Act further defines "labor organization" as any organization or any agency or employee, representation committee or plan, "which exists for the purpose, in whole or in part, of dealing with one or more employers concerning . . . wages, rates of pay, hours of employment, or conditions of work." Art. 5154c, § 5, Vernon's Tex.Rev.Civ.Stat.Ann. It is Texas's public policy that the right of persons to work shall not be denied or abridged because of fact of membership or nonmembership in a labor union or labor organization. Art. 5154g, § 1, Vernon's Tex.Rev.Civ.Stat.Ann. The Act further prohibits the calling,

maintaining, participation in, aiding or abetting any strike or picketing which purpose is to compel, force or coerce any employer to recognize or bargain with any employee or group of employees. Art. 5154g, § 2. Texas allows a public employer to collectively bargain with a labor association or employee representative (employee representation committee or plan) concerning wages, rates of pay, or hours of employment, when: (1) the Act is adopted, after petition and approval of a majority of the voters of the political subdivision. Art. 5154c-1, §§ 3, 5, Vernon's Tex.Rev.Civ.Stat.Ann. Public employee strikes are prohibited under the statute. Art. 5154c-1, § 2(b)(2). No labor organization, including Plaintiff Union, has followed this procedure; therefore, the prohibitions of Art. 5154c are in effect in Harris County.

Excluding Plaintiff Union, Plaintiffs are deputies sheriff, having been reappointed to such positions by Defendant Sheriff Klevenhagen. Under Texas statutes, only a Sheriff has the power to appoint or hire, fire, assign, control and direct the day-to-day activities of his deputies. Tex.Local Gov.Code §§ 85.003, 151.002. Payment of those deputies, however, no longer comes from the monies collected as fees of office by the Sheriff. See former Art. 3912e-4a, Vernon's Rev.Tex.Civ.Stat.Ann. Pursuant to Texas statutes, payment of the deputies sheriff must come from the county's general fund, upon application of Sheriff to the county's governing body—the Commissioners' Court. Tex.Local Gov.Code §§ 151.001, 152.001. Because Commissioners' Court determines the county's budget, Tex.Local Gov.Code § 152.011, it must authorize the payment of appointed deputies sheriff. Tex.Local Gov. Code § 151.002. Commissioners' Court, however, may not "influence" the appointment of a particular person to a budget position so authorized by it. Tex.Local Gov.Code § 151.004. Commissioners' Court classifies, or groups, salaried positions in the County budget. Thus, a deputy sheriff assigned by the Sheriff to a particular budgeted

position is paid the salary for that pay slot. Tex.Local Gov.Code § 152.071.

After the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1984), local governments, such as Harris County, were required to pay overtime to *its* employees engaged in traditional governmental functions, including police protection. Pursuant to congressional legislation, local governments were given until April 15, 1986, to determine their overtime policies. Pub.L. 99-150. The Department of Labor, however, did not publish its final regulations construing the application of the Fair Labor Standards Act ("FLSA') to local government employees until 1987. (See 52 Fed.R. 2012, effective Feb. 17, 1987). The regulations were made applicable to local government employees engaged in police protection.

In Harris County, however, there is no one "police department"; police functions at the county level are performed by eight elected constables, and their deputies, as well as the Sheriff, and his deputies. Art. 2.12, Tex. Code Crim.Proc. Thus, the Sheriff's deputies are not the County's employees, although Harris County must pay them. Pursuant to its statutory duty, Harris County re-enacted its overtime compensation policy, effective December 7, 1985 (See Def. Exhibit "1"). Under that policy, all hours worked over 40 per week, after April 15, 1986, were calculated at the rate of one and one-half times per hour worked over 40 per week, for an accumulation of 240 hours. Compensatory time off is deducted from the accumulated 240 hours. (Def. Exhibit "1" §§ 7.01, 9.04; Def. S.o.F. 11). After 240 hours of compensatory time off accrued, non-exempt employees are paid in cash for one and one-half times the hours over 240 worked at the employee's regular rate ("base pay"). (See Def. Exhibit "3"; Def. S.o.F. 11, 12).

(3) *Defendants' use of compensatory time under FLSA.*—There is no dispute between the parties that County is correct in the multiplication rate of one and one-half times hours worked or in its cash payments for overtime hours worked after 240 hours are accumulated. At issue, however, is whether Defendants are required to pay the accumulated 240 ("banked") hours in cash or compensatory time off.

Assuming that Plaintiff deputies sheriff are County employees, Plaintiffs contend that they are entitled to cash payment for overtime worked in lieu of compensatory time off, because Defendants failed to reach an agreement with them, via Plaintiff labor union. (Pl. S.o.F. 13) Plaintiffs contend that they designated the Harris County Deputy Sheriff's Union to represent them in all FLSA matters; in support of their statement, Plaintiffs cite Plaintiffs' Complaint Exhibit "A" (Pl. S.o.F. 14), which consists of consent forms signed by Plaintiffs from March 23, 1988 to April 1, 1988. Plaintiffs also contend that Plaintiff Union, through its attorneys, "communicated its desire to reach an agreement" about the use of compensatory time and that such communication was made to Defendants' attorney in July, 1986. See Plaintiffs' Complaint Exhibit "E", Pl. S.o.F. 16.

Defendants contend that the combination compensatory time off/cash payment policy was properly enacted and that the individual Plaintiffs agreed to it. Defendants contend that because the overtime policy was a re-enactment of prior County overtime policies, because the policies were effective prior to the work performed, and because Plaintiffs failed to notify Defendants of their appointment of any representative prior to the beginning of the work, Defendants' actions were and are proper as a "regular practice in effect on April 15, 1986." 29 U.S.C. § 207 (o)(2)(A)(ii). (See Def. Exhibit "1", Personnel Regulations effective Dec. 3, 1985; Def. Exhibit "3", pp. 6-7 [Plaintiff Merritt Change in Status and re-

appointment forms, signed and dated Feb. 1, 1986 and Jan. 1, 1985 respectively, to which Plaintiff Merrit agrees that the Personnel Regulations adopted govern "this employment"]).

Defendants further contend that prior to filing of this litigation Defendant Sheriff, the appointing elected official, never received any communication from any plaintiff that Plaintiff Union was designated to represent any particular plaintiff in reaching an agreement for overtime cash payments in lieu of compensatory time off. (See Def. Exhibit "2"; Def. S.o.F. 13) Likewise, and by way of example, payroll records of Plaintiff Merritt (who brings suit in his capacity as Plaintiff Union's president) do not contain any written notification that he sought an agreement to be paid cash in lieu of compensatory time off, or that he had designated anyone to represent him for that purpose. (See Def. Exhibit "3", p. 2) Plaintiff Merritt clearly had an opportunity to so designate each time he signed a Change in Status payroll form; that form specifically states the signer "read, understand(s) and accept(s) . . . the terms and conditions of this employment as recited above and personnel regulations adopted by the Commissioners' Court and changed from time to time."

Defendants respond further that several associations and/or unions purport to represent deputies sheriff, including Plaintiff Union, each claiming varying memberships. (Def. S.o.F. 19) As neither Defendant Sheriff nor the county auditor's payroll personnel were never told by any individual Plaintiff or Union that he or she had appointed Plaintiff Union as his/her representative (until the consent forms were filed in 1988 as part of this litigation), Defendants cannot be faulted for failing to negotiate with that representative, especially when opportunity was given individual Plaintiffs when yearly payroll forms were signed.

Pursuant to 29 U.S.C. § 207(o)(2)A)(ii), a public agency may provide compensatory time off in lieu of

cash payments for overtime worked when the employee is not covered by a collective bargaining agreement, memorandum of understanding or any other agreement between the employing agency and the employee's representative, which agreement or understanding is made before the performance of work. Section 207(o)(2) further provides:

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii).

Thus, the date "before the performance of the work" is April 15, 1986.

> An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who *fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay.* (emphasis added)

52 Fed. Reg. 2012, 2035 (Jan. 16, 1987); 29 CFR 553.23 at 295-296 (7-1-87 Edition)

Union attempts to circumvent the requirement that the individual Plaintiffs had to tell the Sheriff (or, at the least, the county auditor's payroll personnel) that time off in lieu of cash was not acceptable to them; and that such notification from the individual Plaintiffs should have been made before April 15, 1986 or when yearly payroll forms were signed. Union contends that its generalized attempt to bargain for its unnamed members, without identification of them, is authorized as the individual Plaintiffs' "representative."

What Union proposes, is to do indirectly that which it cannot do directly under Texas statutes. Union seeks recognition of Union as a collective bargaining association and seeks, in effect, collective bargaining, which is prohibited under Texas statutes unless voter approval is secured. Arts. 5154c, §§ 1, 2; 5154c-1, Vernon's Tex.Rev. Civ.Stat.Ann.; *Amalgamated Transit Union, Local Div. 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107 (Tex. Civ.App.—Dallas 1968, ref., n.r.e.)

"Collective bargaining" has been defined as "settling disputes by negotiation between the employer and the representative of the employees," *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 1955); ". . . an activity presupposing that the employees shall have an opportunity in absence of their employer to canvass their grievances, formulate their demands in common, and instruct an advocate who they believe will best press their suit," *NLRB v. Stow Mfg. Co.*, 217 F.2d 900, 904 (2d Cir. 1954). Collective bargaining "involves the right of members of an organization, either through a committee or representative, to confer with the employer, and to present their claims or grievances as to hours, wages . . . incident their employment, with the end view of arriving at a reasonable and amicable adjustment of such matters." *Yellow Cab Operating Co. v. Taxicab Drivers Local Union 889*, 35 F.Supp. 403, 412 (Okla. 1940). Collective bargaining "implies a mutual exchange of ideas, reasons, and grounds for approving or disapproving submitted propositions." *Yellow Cab, Id.* It is the method of settling disputes "by negotiation between employer and the representative of the employees." *United Construction Workers v. Haislip Baking Co.*, 223 F.2d at 877, citing *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed.2d 789 (1937).

Under Texas law, an association authorized to collectively bargain with a public employer is defined as "any organization of any kind, or any agency or employee

representation committee . . . and which exists for the purpose, in whole or in part, of dealing with one or more employers . . . concerning . . . wages, rates of pay, hours of employment. . . ." Art. 5154c-1 § 3 (4), Vernon's Tex. Rev.Civ.Stat.Ann.

In construing 29 CFR § 553.23, Department of Labor comments state that:

> The Department recognizes that there is a wide variety of State law that may be pertinent to this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.

52 Fed.Reg. 2012, 2014-15 (Jan. 16, 1987). Deferring to Texas law under these facts, it is clear that Union's "representation" is prohibited and that Defendants' overtime policy is proper.

In *Abbott v. City of Virginia Beach*, —— F.2d —— (4th Cir., July 19, 1989), 1989 WL 78709 [case below, 689 F.Supp. 600 (D.C. Va. 1988)], the Court of Appeals affirmed the trial court's decision that Virginia's statute prohibiting collective bargaining with employee representatives was not contrary to the Section 207 (o). Although Plaintiffs try to distinguish this case as not controlling for reason that Virginia has a constitutional prohibition (while Texas does not) against public employer collective bargaining, a careful reading of that well reasoned opinion shows it is on point. In *Abbott*, Virginia Beach enacted its compensatory time off policy on April 1, 1986; the city adopted its policy without reaching an agreement with two Plaintiff unions and 126 individual plaintiffs who claimed the unions to be their representatives. In affirming the trial court, the appellate court cited a Virginia Supreme Court decision in *Commonwealth v. County Bd. of Arlington County*, 232 S.E.2d 30 (1977). In that decision, the Virginia Supreme Court

said a county board and county school board could not recognize a labor union as the exclusive agent for public employees; further, the boards were not authorized under Virginia *statutes* or its constitution, to negotiate and enter into binding contracts with the labor organization concerning terms and conditions of employment. Turning next to the Secretary of Labor's comments contained in the Federal Register, the Fourth Court of Appeals cited the Secretary's "intention that the question of whether employees have a representative for purposes of FLSA section 7 (o) shall be determined in accordance with State or local law and practices." 52 Fed.Reg. 2012, 2014-15. Because Virginia statutes prohibited such recognition and negotiation, and because of the Secretary of Labor's comments to the regulations, the federal court of appeals held that 29 U.S.C. § 207 (o), authorized the city's adoption of its April 1 policy without an agreement with Plaintiff unions, before enactment or thereafter. In the case at bar, Harris County re-enacted its overtime policy, effective December, 1985; as in *Abbott*, Texas prohibits collective bargaining with a public employer, absent voter approval. *Amalgamated Transit Union, Local Div. 1338 v. Dallas Public Transit Bd., supra.* The *Abbott* holding should be followed in this cause.

Plaintiffs cite four cases for the proposition that other courts have held in support of their position. These cases are: *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, —— F.2d —— (10th Cir. June, 1989), [case below, 28 WH Cas. 981 (D.C. Colo. 1988)]; *Jacksonville Prof. Fire Fighters Assoc., Local 2961, IAFF v. City of Jacksonville*, 685 F.Supp. 513 (E.D. N.C. 1987); *Dillard v. Harris*, 695 F.Supp. 565 (N.D. Ga. 1987); *Wilson v. City of Charlotte*, 702 F.Supp. 1232 (W.D. N.C. 1988). Each of these cases are factually distinguishable from the case at bar. In each case cited, and before the effective date of § 207 (o), plaintiffs notified their governmental employer that they wanted to negotiate a compensatory pay

package, and each plaintiff had signed petitions designating a union or union committee as their representative for that purpose. In this cause, no Plaintiff notified Defendant Sheriff or auditor payroll personnel of his rejection of the compensatory time off policy and no Plaintiff, at any time, signed and presented petitions to Defendant Sheriff, or auditor payroll personnel, designating Plaintiff Union (or anyone) as their representative to negotiate a compensatory time off policy.

In *West Adams*, Defendant District had a policy, since 1983, of compensatory time off, since 1983, which it reiterated in late 1985 and early 1986. In late 1985, Plaintiff union sent a letter and petition to the District's chief; in the signed petition, employees designated Plaintiff union as their representative to negotiate for compensatory time.

In *City of Jacksonville*, Plaintiff union president sent a letter and petition, signed by 32 firefighters, designating the union as their representative for compensatory time. The letter and signed petition were received by Defendant City's manager on March 17, 1986. The City adopted its compensatory time off policy on April 23, 1986, after the effective date of § 207 (o).

In *Dillard*, the Georgia Department of Human Resources adopted a compensatory time off policy, effective March 1, 1986. On April 14, 1986, employees at GRC (one of the hospitals covered by the overtime policy) delivered a signed petition designating GRC organizing committee and two individual plaintiffs as their representative for negotiations. That same date, two other petitions, signed by employees at two other hospitals (including three individual plaintiffs at each hospital) were forwarded to Defendant Department. These latter petitions, however, did not designate a representative. Because the plaintiffs' first signed petition designated (before April 15) a representative, the court held an agreement with the representative was required in lieu of

cash payments for overtime. The trial court also held that because the latter two signed petitions (of April 14) did not designate a representative, the court could not agree with Plaintiffs' contention that Defendant Department was required to pay cash in lieu of compensatory time off.

In *City of Charlotte*, up to 240 hours of accumulated overtime was "banked", effective March 24, 1986; before 1986, the city's policy was to use compensatory time off. Prior to the city's adoption of that policy, in December, 1985, Plaintiff Wilson wrote the chief of city's firefighter department that employees in the department had selected Plaintiff union as their representative for the purpose of discussing and entering into an agreement for use of compensatory time in lieu of overtime pay. Attached to Plaintiff Wilson's letter was a 14-page signed petition, designating the union as the employee's representative. Unlike the case at bar, plaintiffs in *City of Charlotte* had written the head of their department, enclosing a signed petition designating the union as their representative. In addition, the notification was several months prior to April 15, 1986, the date "before the performance of the work." In the case at bar, Plaintiffs did not notify their department head (the Sheriff) and did not sign a petition designating Union as their representative. Although Union's attorney wrote a letter to Defendants' legal counsel in July, 1986, Plaintiffs do not contend the letter was signed by the individual Plaintiffs and designated Union as their representative. In any event, the letter was written well after April 15, the date work began.

Thus, under the authorities cited above, Defendants' re-enacted compensatory time off policy constitutes a "regular practice," the agreement or understanding of which may be presumed to exist for the purposes of § 207 (o) and § 553.20.

Agreement form not required.—The agreement or understanding further is evidenced by the Harris County

personnel handbook (Def. Exhibit "1") and by way of example, the employee's signature to county auditor payroll forms (Def. Exhibit "3", pp. 6-7) in which the employee agrees to the personnel regulations (including the compensatory time off provisions). Although Plaintiffs' suggest a more formalized agreement, no specific form is required under the Labor Department's regulations, as long as record of it is kept. 52 Fed.Reg. 2012, 2035 (Jan. 16, 1987); 29 CFR § 553.23 at 295 (7-1-87 Edition) Auditor payroll forms reflect the number of hours worked per week, the number of overtime hours accrued, hours "banked" and hours taken as compensatory time off. (See Def. Exhibit "3", affidavit of C.J. Hrachovy) Coupled with the personnel regulations and other payroll forms referring to those regulations, these documents are sufficient to satisfy § 553.23.

(4) *Calculation of compensation.*—As stated above, payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate as compensatory time off is authorized.

Payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate, in cash, after the individual plaintiff has accumulated 240 hours of compensatory time off also is authorized. 29 CFR §§ 553.23 (a) (2), 553.26 (a)

At issue in this case is the inclusion of "longevity" in the calculation of the regular dollar rate by which overtime is paid. In other words, when deputy Y works overtime, his overtime hours are recognized and accrued on the payroll forms. For every overtime hour worked, it is multiplied by one and one-half with the product ("product hours") added to the "banked" hours. When deputy Y reaches a total of 240 hours, he is paid, in dollars, the number of product hours multipled by his calculated hourly rate derived from his "base pay".

Plaintiffs contend that the base pay (or regular rate) should include "longevity" payments in the calculations

of hourly rate. Defendants contend "longevity" is properly excluded from the calculation of regular rate of pay under the "gift or similar payment" exemption. 29 U.S.C. § 207 (e) (1); 29 CFR § 778.212 (b) Section 207 (e) provides:

> As used in this section "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to . . . the employee, but shall not be deemed to include—
>
> (1) sums paid as gifts; payments in the nature of gifts . . . as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency.

"Regular rate" is not defined further in the regulations, 29 CFR § 553.233, although rules for computation are given. 29 CFR § 778.212. Under the regulations, the bonus payment must be in the nature of a gift. "If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift." 29 U.S.C. § 778.212 (b)

Longevity may be excluded from the regular rate of pay under section 207 (e) (1),

> even though it is paid with regularity so that employees are led to expect it and even though the amounts paid to different employees . . . vary . . according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency.

29 CFR 778.212 (c)

The federal regulations state that an amount paid for each five years of service "with the firm, for example, would be excludable from the regular rate under this category." *Id.*

In 1985, longevity payments were set at $60 per year for each full year of service in Harris County government, payable in monthly installments during the County's fiscal year. The amount is determined by Commissioners' Court during the annual budgetary process; payments began with the first paycheck after January 1. For example, Plaintiff Merritt was awarded $60, payable monthly, in longevity payments effective January 1, 1985; in 1986, the paid monthly amount was $70; and in 1987, $75 paid monthly. (See Def. Ex. 3, pages 5-7, auditor payroll forms) Because longevity payments are awarded solely on length of service and without regard to number of hours worked, productivity or efficiency standards, they are properly excluded from base pay (regular rate) hourly rates.

(5) *Firearms certification and remedial firearms training.*—Plaintiffs contend firearms training should be compensated as overtime cash payments. Basic certification or qualification occurs during the prospective deputy's initial training course which he must complete to meet state-imposed licensing criteria. These basic courses are offered throughout the state, including the University of Houston. When these courses are taken at these institutions, the prospective deputy obviously is on his own time. When taken through the Harris County Sheriff's Academy, the training and qualification are part of the regular school or work day for which the deputy is paid. 29 CFR § 553.226 (Def. S.o.F. 17) Harris County has no authority to require deputies sheriff to qualify in firearms to meet state annual firearms qualification requirements. (Def. S.o.F. 14) Deputies are required by Defendant Sheriff to qualify on a semi-annual basis. Deputies whose firearms score is less than 60 per cent are required to attend a remedial classroom and range sessions conducted during regular business hours at the Harris County Sheriff's Academy. During that period of time, the officer does not work at his regular assignment, but attends the Academy in lieu of that assignment. As his Academy sessions are not in addition to, but are in lieu of, his regular work

assignment, the deputy does not accrue overtime and is compensated at his base pay rate for a regular work day.

Federal regulations state that attendance outside regular working hours at specialized or follow-up training for certification, when required within a particular jurisdiction (by the county Sheriff), does not constitute compensable hours of work. 29 CFR § 553.227 (b) (1) Attendance outside of regular working hours at specialized or follow-up training for certification, required by a higher level of government (such as the State of Texas), does not constitute compensable hours of work. 29 CFR § 553.227 (b) (2) Even if costs are borne by the employer, such time is not compensable hours of work. 29 CFR § 553.227 (b) (3)

Under the regulations and the facts of this case, it is clear that qualification and remedial training are not included in calculations for compensable time; thus, no overtime compensation is due.

(6) *Statute of Limitations.*—Defendants have raised the affirmative defense of the two-year statute of limitations, barring that portion of Plaintiffs' claims, if any, arising more than two years before the date of filing this litigation on April 15, 1988. The two-year statute of limitations is applicable to actions brought under FLSA for unpaid overtime compensation or liquidated damages. 29 U.S.C. § 255 (a) Pursuit of administrative remedies does not toll the statute. *Aguilar v. Clayton*, 452 F.Supp. 896 (E.D. Okla. 1978)

Although the statute allows a three-year period for "willful" violations, that period is inapplicable under these facts. Prior to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 1105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), local governments were not liable for cash overtime payments to employees involved in traditional governmental functions, such as law enforcement. *National League of Cities v. Usery*, 426 U.S. 883, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) In *Garcia*, the U.S. Supreme

Court held that the distinction between governmental and other functions was unworkable; therefore, local governmental units were subject to FLSA provisions governing overtime and minimum wages for those employees engaged in traditional governmental functions. In response to *Garcia*, Congress enacted Pub.L. 99-150. That statute provided that no political subdivision of a state is liable under 29 U.S.C. § 216 for a violation of 29 U.S.C. § 207 occurring before April 15, 1986. The amendments set forth in Pub.L. 99-150 took effect on April 15, *1986*. The Department of Labor's regulations were not effective until February, *1987*. These regulations were the guidelines by which local governments could determine how to apply 29 U.S.C. § 207 (o), enacted in response to *Garcia*. Under the regulations and § 207 (o), the combination overtime policy of compensatory time off and cash paid (after 240 hours accrued) was authorized as a prior, regular practice.

Thus, because of the Congressional intent that local governments are not liable for payment of overtime for the period ending April 14, 1986, and the fact that the Department of Labor had no regulations guiding local governments until 1987, the two year statute of limitations should apply.

(7) *Defendants acted in "good faith" and with reasonable belief.*—Plaintiffs seek liquidated damages pursuant to 29 U.S.C. § 216 (b). Defendants respond that liquidated damages should not be awarded if liability is found, because their actions were taken in good faith and with a reasonable belief their actions were proper. 29 U.S.C. § 260

Under the Portal-to-Portal Act, 29 U.S.C. § 260, the court "may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 [29 U.S.C. § 216]." It is the employer's burden of persuasion and proof that his actions were both in good faith and predicated upon such reasonable grounds that "it would be unfair to impose upon him more than a compensatory verdict." *Barcellona v. Tiffany English Pub. Inc.*, 597 F.2d 464, 468 (5th Cir. 1979)

Liquidated damages should not be imposed for several reasons. First, Congress exempted local governments from liability for cash payments for overtime hours when there was a regular practice of compensatory time off in effect before April 15, 1986 (effective date of Pub.L. 99-150). Defendants' policy of using compensatory time off was re-enacted, effective December, 1985, before work began under the County's new fiscal year beginning in 1986.

In addition, until the filing of the consent forms attached to Plaintiffs' Original Complaint in 1988, no individual Plaintiff orally or in writing informed Defendants that he wanted to reach an agreement concerning the compensatory time-off policy. (See Def. Ex. 2, 3) As in *Abbott v. City of Virginia Beach*, —— F.2d —— (4th Cir., July 19, 1989), 1989 WL 78709, Texas statutes prohibits a County from collectively bargaining with a representative, unless and until other statutory requirements are met. Union's contention that it was acting as a "representative" is misleading in that neither the individual Plaintiffs or Plaintiff Union ever designated Union as a representative to Defendants to reach an agreement on each individual's behalf. In fact, Union states that by its legal counsel's letter in July, 1986, Union was acting for an unspecified group; acting on behalf of the group constitutes collective bargaining prohibited by Texas statutes.

Even if Union could be classed as a "representative", individual Plaintiffs' failure to designate, in writing (until this litigation) Union as the representative in each individual's behalf should not impose liability upon Defendants for liquidated damages. It is difficult to reach an agreement with any Plaintiff when he fails to step forward and voice his desire to enter into a different compensatory overtime arrangement.

As stated previously, Pub.L. 99-150 provided that local governments were not liable for cash payments if a prior, regular practice of compensatory time off was in place. The effective date of computation of overtime for cash payment purposes was April 15, 1986; however, the Department of Labor regulations construing the statute were not effective until February, 1987. During this interim period, local governments had no guidance other than the statute's language, which specifically provided that compensatory time off could be used in lieu of cash payments for overtime worked. Today, the regulations and the statute continue to allow such a policy. The court decisions construing § 207 (o) state compensatory time off is allowed. These later decisions have found local governmental liability only when the employees have each petitioned and designated a representative for a different policy prior to the enactment of the local government's compensatory time-off policy or before the work began. As stated in the discussion concerning Defendants' use of compensatory time (above), the facts of those judicial decisions, in other circuits, are distinguishable from those in this litigation and, because of those different facts, those decisions are inapplicable here.

WHEREFORE, Defendants pray that Plaintiffs' Motion for Partial Summary Judgment be denied and that their Motion for Summary Judgment be granted, in all things.

Respectfully submitted,

/s/ Ann Hardy
ANN HARDY
Adm. Id. 3231
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7869
Attorney for Defendants

Of Counsel:
MIKE DRISCOLL
Harris County Attorney

No. 92-1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,
v.
JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

MICHAEL T. LEIBIG
(Counsel of Record)
ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & DRIESEN
1025 Connecticut Ave., N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5340

Counsel for Lynwood Moreau and all other Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 7(o) of the Fair Labor Standards Act, as amended, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid in cash at a rate of time and a half. Under § 7(o), a public employer may provide compensatory time in lieu of overtime pay in cash *only* pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

The question presented here is whether a public employer in a state which does not provide for formal collective bargaining, who refuses to respond to or to work out a compensatory time agreement with a representative designated by its employees for that purpose, may nonetheless unilaterally formulate and impose a compensatory time agreement on its employees?

PARTIES TO THE PROCEEDING BELOW

I.

PLAINTIFFS/APPELLANTS/PETITIONERS

Lynwood Moreau individually and as president of the Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, and as FLSA REPRESENTATIVE of 37 similarly situated, consenting Harris County Law Enforcement Officers.

The Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, on its own behalf, and as an FLSA representative of the 400 Deputy Sheriffs it represented at the initiation of this litigation, and its 1670 current Deputy Sheriffs members.

Kenneth O. Adams
Daniel Almendarez
Shirley Ashcraft
Jeron McNell Barnett, Sr.
Humberto Rios Barrera
M. Barron
Mark D. Baughman
Bradley T. Bennett
Richard M. Blackwell
Alton W. Bowdoin
Bruce Breckenridge
Richard E. Burns
Don E. Bynum
Chuck Calvit
Robert Casey
Richard A. Castillo
John Robert Chaney
Paul Steven Cordova
John F. Costa
Carl Davis, Jr.
John P. Denholm
Dan B. Daiz
Nelda DeLaCruz
Chris E. Dempsey
James Dewey
Feliz Dlouly, III
Karen Douglas
Donald R. Downey
Grady E. Dukes
Ray A. Dupont
Freddy G. J. Lafuente
J. J. Freeze
Kim L. Fuller
Manuel R. Garza
Thomas E. Goodfellow
Michael Gregory Gonzales
Vincent A. Gonzales
P. R. Halfin, Jr.
James H. Happel
Mona F. Hawk
R. L. Hassel
Neal Hines
James M. Hoffman
Annette M. Horton
Larry D. Howell
Vernon Levone James
Joe Franklin
Jimmie L. Jones

Patrick A. Kaptchinskie
Warren A. Kelly, Jr.
James Paul Kershaw, Jr.
Janet L. King
Margaret L. Knigge
Dennis R. Koch
Cassandra Leach
Brian D. Leighton
Barbara Leitner
Vernon Scott Lemons, Jr.
Ron Lenard
Kenneth V. Liquori
Robert Richard Long
David Lopez
Leonel Martinez
Joe Clinton Mayes
Russell Lee Mayfield
James Kevin McGehee
Eugene T. Merritt, Jr.
Marty M. Mingo
Diane L. Mireles
L. V. Moreau
Joe A. Munoz
John M. Owens
Barnard G. Palmer
Gary Wayne Phillips
Thomas Wayne Phillips
Gregory D. Pinkins
Larry Pohlmeyer
Joshua Todd Porter
Carlos M. Ramirez
Michael Rankin
James W. Redd
James A. Reed
James C. Reynolds, III
Donald L. Robinson
R'Wanda Sampson
Michael Wayne Simpson
James W. Sims
M. J. Smith
Russell Rocamontes
Stephen Wayne Russell
William J. Ryan
Andres Sanchez
Denise A. Schreiber
J. C. Seckler
Lawrence R. Seward
Donald Shaver
James K. Shipley
Michael D. Sieck
James M. Siegel
Effie Louise Skinner
Patrick Spacek
Pamela Stanford
Rickye Stanford
Terry Stolitza
Rachel Tolbert
Dennis J. Tones
Robert Thomas Tonry
Thurman T. Tyndall
Mark A. Walker
Walter L. Walker
Roger D. Wedgeworth
Calvin Gary Wilson
Terry Allen Wooten

II.

DEFENDANTS/APPELLEES/RESPONDENTS

Johnny Klevenhagen, Sheriff of Harris County, Texas.

Judge Jon Lindsay, Harris County Commissioner, Harris County, Texas.

Harris County, Texas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1

LYNWOOD MOREAU, *et al.*,
Petitioners,
v.
JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 956 F.2d 516 (5th Cir. 1992) and is reproduced as Appendix A (pp. 1a-14a) in the separately bound Appendix to the Petition for a Writ of Certiorari ("Pet. App.") in this case.

The District Court's memorandum and order denying plaintiffs' motion for partial summary judgment and granting defendants' motion for summary judgment, dated August 29, 1990, is unreported and is reproduced as Appendix B in the Appendix to the Petition. (Pet. App. 15a-24a). The District Court's final judgment dated August 29, 1990 is unpublished and is reproduced as Appendix C in the Appendix to the Petition (Pet. App. 25a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on March 31, 1992. The Petition for a Writ of Certiorari was filed on June 29, 1992, and this Court granted that Petition on October 5, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Section 7(o) of the Fair Labor Standards Act, 29 U.S.C. § 207(o), is reproduced in Appendix E of the Appendix to the Petition (Pet. App. 28a-29a).

The Secretary of Labor's regulations set out at 29 C.F.R. § 553.23, are reproduced in Appendix E of the Appendix to the Petition (Pet. App. 30a-35a).

STATEMENT OF THE CASE

1. Section 7(a) of the Fair Labor Standards Act, as amended, establishes a general rule that employers must pay their employees one and one half times the employees' normal pay for overtime work. 29 U.S.C. § 207(a). FLSA § 7(o), added to the Act in 1985, however, establishes a limited exception to this general rule with respect to *public employers*: such employers may, under certain stated circumstances, provide "compensatory time"—*viz.*, paid time off—in lieu of the overtime pay that the Act normally requires. 29 U.S.C. § 207(o).

In the regard most pertinent here, § 7(o)(2)(A)(i) states that compensatory time may be provided in lieu of the normally required overtime pay when authorized by the "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . ." The statute also specifies that this is the *only* way in which a public employer may utilize compensatory time for those employees who are "covered by" § 7(o)(2)(A)(i). 29 U.S.C. § 207(o)(2).

2. Petitioners in this case are all deputy sheriffs in Harris County, Texas, employed by the Harris County Sheriff's Department and the Sheriff of Harris County, Johnny Klevenhagen. Seeking to utilize the option presented by FLSA § 7(o)(2)(A)(i), the 113 petitioners designated the Harris County Deputy Sheriffs Union, Local 154 and/or Eugene T. Merritt, Jr. or Lynwood Moreau—each an officer of Local 154[1]—as their representatives for the purpose of reaching an FLSA compensatory time agreement with their public employer. Harris County was formally notified of this designation on July 8, 1986. Local 154 has represented deputy sheriffs in Harris County for more than ten years in a variety of capacities, including representation in grievance proceedings, civil service hearings, worker compensation proceedings, budget proceedings, in proceedings before the Harris County Board and the Sheriff, and in the deputies' day-to-day problems and controversies concerning working conditions. Local 154 had also previously reached an agreement with the County which provides for the deduction of union dues from the payroll of those deputy sheriffs wishing to have union dues deducted.

Despite this designation of FLSA representation, Harris County neither sought a compensatory time agreement under FLSA § 7(o)(2)(A)(i) nor provided the deputy sheriffs with overtime pay. Instead, while refusing to treat with the petitioners' representatives, Harris County affirmed and reenacted the portion of its prior pay system concerning compensatory time. *See* Harris County Personnel Regulations, Overtime Compensation for Non-Exempt Employees, Sections 7.01 and 7.02 (effective Dec. 7, 1985).[2]

---

[1] On April 15, 1988, when the suit was originally brought, Eugene T. Merritt, Jr. was president of the union. Later, Lynwood Moreau became president of the union.

[2] Various controversies regarding the prior compensatory time rules generated petitioners efforts to obtain a compensatory time agreement under FLSA § 7(o)(2)(A)(i). Specifically, petitioners

All of these Harris County provisions concerning the use of compensatory time had been imposed unilaterally by the County as a condition of employment. All employees hired after April 15, 1986, as part of the "checking in process," are required to sign the County Auditor's new hire payroll compensation forms, which contain a boiler plate provision stating that the signature of the employee evidences that he or she had read, understood, and accepted the terms and conditions of employment, as recited on the form and in the Harris County personnel regulations. See ¶ 13 to Defendants' Statement of Facts, Joint Appendix ("Jt. App.") at 28.

3. Because Harris County has continued to use its unilaterally adopted compensatory time system while refusing to enter into any dicussions or agreements with Local 154 or any other representative designated by the deputies concerning overtime compensation, petitioners instituted this suit in the United States District Court for Southern District of Texas on April 15, 1988. Petitioners' Complaint challenged the legality of the County's requirement that deputy sheriffs accept compensatory time off in lieu of overtime pay despite their designation of a representative and despite the absence of any agreement with that representative.

The district court and the United States Court of Appeals for the Fifth Circuit below upheld the Harris County program and dismissed petitioners' claims. In doing so, these courts purported to follow prior cases of the Fourth and Eleventh Circuits interpreting FLSA § 7(o)(2)(A), and to reject cases on the same subject in the Ninth and Tenth Circuits.

---

sought a clear rule concerning when compensatory time could be used, preserved, or cashed out, and how they would gain access to compensatory time. In these ways, petitioners sought—through an agreement under FLSA § 7(o)(2)(A)(i)—to protect the value of the compensatory time option offered by the FLSA.

Based on the conflicts among the circuits that the interpretation of FLSA § 7(o)(2)(A) has generated, petitioners filed a petition for *certiorari* in this Court. On October 5, 1992, this Court granted that petition.[3]

SUMMARY OF ARGUMENT

1. This case involves the proper interpretation of FLSA § 7(o)(2)(A), which sets out the means by which public employers may bring themselves within a special exception to the general FLSA policy of requiring overtime pay for all overtime hours worked (and, accordingly, of prohibiting the use of compensatory time arrangements as an alternative). *See* 29 U.S.C. § 207(a).

Petitioners—as employees who have designated a representative to negotiate an agreement with their employer on the issue of compensatory time, as provided in § 7(o)(2)(A)(i)—contend that they fall within that provision's coverage. Petitioner's position is that their employer may therefore only use compensatory time in lieu of overtime pay pursuant to some form of agreement or understanding with petitioners' representatives.

---

[3] As discussed in the Petition for Certiorari, five United States courts of appeals have decided cases in which public employees, in states where public employees have no collective bargaining rights under state law, have claimed that their employers violated the FLSA by adopting compensatory time programs without reaching agreements under § 7(o)(2)(A)(i) with the employees' designated representatives. The Ninth and Tenth Circuits, following somewhat different rationales, have sustained these employee claims. *See Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549 (9th Cir. 1990); *Local 2203 v. West Adams Co. Fire District*, 877 F.2d 814 (10th Cir. 1989). In addition to the court below, the Fourth and Eleventh Circuits have rejected such claims, again adopting various distinct rationales. *See Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) (en banc); *id.* at 1396 (Luttig, J., concurring); *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990); *cf. Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990). *But see Wilson, supra*, 964 F.2d at 1400 (Ervin, J., dissenting) (5 members of court urging that court follow reasoning of Tenth Circuit in *Local 2203* case).

Respondents, in contrast, argue that § 7(o)(2)(A)(i) applies only where the employer chooses to enter some type of agreement wih its employees' representatives. According to respondents, a public employer has the option of refusing to enter such an agreement and, instead, of imposing its preferred compensatory time program under § 7(o)(2)(A)(ii) as a condition of employment.

2. As we will show, while the statutory language is not perfectly clear, the authoritative regulations of the Department of Labor clearly support petitioners' position and reject respondents' position. There are, however, particularly compelling reasons for recognizing the Department of Labor regulations at issue here as authoritative.

First, those contemporaneous regulations were promulgated at the specific direction of Congress, which mandated that the Labor Department—which had been intimately involved in the legislative deliberations—use its rulemaking authority to implement the particular statutory provisions at issue here. *See* pp. 12-14, *infra*.

Second, the Labor Department's interpretation of this statutory provision is fully supported by one of the major documents from the relevant legislative history, the Report of the House Committee on Education and Labor, H. Rep. 99-331, 99th Cong. 1st Sess. (1985), which commented on the precise language now at issue. *See* pp. 14-15, *infra*.

Third, the Labor Department's regulation is fully consistent with the overall policy approach to the issue of compensatory time that animated the 1985 legislative deliberations that produced the Amendments Act. Those deliberations reflected a consensus that compensatory time should be available in public employment when offered under terms that would be mutually agreeable to the parties concerned. Congress, in contrast, did not embrace the proposition that, where employees designate a representative, public employers should nevertheless be able to unilaterally impose their own chosen terms regarding compensatory time. *See* pp. 15-18, *infra*.

Finally, the rulemaking process assured that the regulations represent the contemporaneous, carefully considered, and fully-informed judgment of the Secretary, made with full benefit of the views of all concerned parties. *See* pp. 18-19, *infra*.

3. Three lines of argument have been advanced in support of respondents' challenge to the Department of Labor's interpretation of this statute. None of these lines of argument has merit.

First, respondents argue that their interpretation is supported by the plain meaning of the statute. This argument ignores the statutory language's open texture and results in a reading that denies the statutory provision all meaning and effect. *See* pp. 20-21, *infra*. Moreover, respondents' proffered interpretation of the statute is entirely incompatible with the legislative history. *See* p. 22, *infra*.

Second, respondents assert that Congress intended FLSA § 7(o)(2)(A)(i) not to apply in states—such as Texas—where formal collective bargaining in the public sector is prohibited by state law. This assertion, however, adds a requirement nowhere to be found in the statute, reads language out of the statutory text, and ignores the background against which Congress acted. *See* pp. 23-27, *infra*.

Third, in a variant of the same argument, respondents assert that Texas law prohibits any binding contracts between public employers and their employees' labor unions, and that this fact should render FLSA § 7(o)(2)(A)(i) inapplicable. Once again, this argument misconceives the statutory and relevant administrative materails. The relevant statutory provision simply does not bind any public employer to any agreement establishing enforceable obligations of the kind established by the law of contracts. Rather, the provision opens a limited option to public employers, which the employers may exercise if they choose, and then renounce at any time. *See* pp. 27-32, *infra*.

ARGUMENT

A. The Relevant Statutory and Administrative Provisions and Their Background

1. Under § 7(a) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 207(a) ("FLSA" or "the Act"), employers must generally pay all covered employees for all overtime hours worked "at a rate not less than one and one-half times [their] regular rate." The issue in this case concerns the scope of an *exception* to this general rule created for public employers by FLSA § 7(o)(2)(A), of the Act, which was added to the Act as part of the Fair Labor Standards Amendments Act of 1985 ("Amendments Act"), P.L. 99-150; 99 Stat. 790 (1985).

In relevant part, § 7(o)(2)(A) provides as follows:

> (2) A public agency may provide compensatory time [in lieu of overtime] only—
>
> (A) pursuant to—
>
> (i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; . . .
>
> * * * *
>
> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o)(2)(A) (*reprinted* at Pet. App. 29a).][4]

It is petitioners' contention in this case that, under subclause (i) of this provision, if the employees of a public employer designate a representative to negotiate with their employer regarding a compensatory time agreement, thereafter their employer may only provide compensatory time in lieu of overtime pursuant to a mutually acceptable compensatory time agreement. To put this another way, the public employer, in such a circumstance, must either conform to the normal overtime pay requirements imposed by the statute on employers generally, or reach and abide by the terms of a subclause (i) agreement.

In contrast, respondents contend that their program of providing compensatory time in lieu of overtime pay is validated by subclause (ii) of § 7(o)(2)(A), even though respondents' employees designated a representative to seek a compensatory time agreement with respondents, and respondents refused to entertain any such agreement. This is so, respondents have argued, because subclause (ii) permits a public employer to pro-

---

[4] Other provisions of FLSA § 7(o) establish minimum standards that all compensatory time agreements by public agencies must meet to comply with the Act. For example, under § 7(o)(1), all compensatory time agreements must provide "time off [to employees] at a rate not less than one and one-half hours for each hour of [overtime] employment"; under § 7(o)(3)(A), compensatory time agreements may only be provided to employees for a statutorily specified maximum of overtime hours worked, with any further overtime work being compensated in overtime pay; under § 7(o)(4), compensatory time agreements must provide that employees will receive payment at no less than certain specified rates for any compensatory time unused upon their termination; under § 7(o)(5), employees must have the right to use their compensatory time off within a "reasonable period" after requesting use of that time; and, under § 7(o)(6)(B), employees must receive full regular compensation during any compensatory time off taken. *See* 29 U.S.C. § 207(o).

vide compensatory time either pursuant to the terms of an agreement between the employer and the individual employee (with the employer able to make acceptance of such terms a condition of employment) or—for those hired before April 15, 1986—pursuant to the employer's regular prior practice. 29 U.S.C. § 7(o)(2)(A)(ii). Subclause (ii) of FLSA § 7(o)(2)(A) limits the class that it governs to "employees *not* covered by subclause (i)."

2. As the foregoing review of the basic statutory material shows, the controversy here arises because subclause (i), which is cross referenced in subclause (ii), does not demarcate any particular class of employees. Rather, that subclause provides that, within its province, compensatory time may be provided only pursuant to

> [a]pplicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees. . . . [29 U.S.C. § 207(o)(2)(a)(i).]

Thus, exactly which classes of employees are "covered by subclause (i)" and which are "not covered" is not explicitly stated in the statutory text. As the Tenth Circuit explained, "it is unclear whether [the phrase "employees not covered by subclause (i)"] means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative." *Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-17 (10th Cir. 1989). Given this ambiguity, and given Congress' action in charging the Department of Labor with the authority to administer the FLSA, the proper starting point in clarifying the meaning of § 7(o)(2)(A) is the Department's interpretation of that provision.

3. In enacting the Amendments Act, Congress specifically provided that "[t]he Secretary of Labor shall . . . promulgate such regulations as may be required to implement" the provisions of the Amendments Act. P.L. 99-150, § 6, 99 Stat. 790 (1985). Pursuant to this command, the Secretary of Labor, after full notice and comment

procedures, issued regulations which specifically address the issue posed here.

The Department of Labor's regulations make two interpretative points clear:

First, the employees "covered by subclause (i)"—and thus excluded from subclause (ii)—are employees who "have a representative." 29 C.F.R. § 553.23(b)(1) (*reprinted* at Pet. App. 30a). And, these employees remain "covered by subclause (i)"—and thus excluded from subclause (ii)—regardless of whether an agreement between their employer and their representative has been successfully concluded. *Id.* In this regard as the regulations state:

> Where employees have a representative, the agreement or understanding concerning the use of the compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. [*Id.*]

And, the regulations add that subclause (ii) governs only in circumstances "[w]here employees of a public agency do not have a recognized or otherwise designated representative." 29 C.F.R. § 553.23(c)(1).

Second, the regulations go on to make explicit that employees shall be deemed to "have a representative"—and thus be "covered by subclause (i)"—once the employees designate a representative; no formal arrangement or recognition by the employer is necessary:

> In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. § 553.23(b)(1) (*reprinted* at Pet. App. 31a).]

Therefore, these regulations make it clear beyond a doubt that respondents, once their employees have des-

ignated a representative to negotiate a compensatory time agreement under FLSA § 7(o)(2)(A)(i), are required either to pay their employees overtime pay under the FLSA's normal rules or to reach and abide by a compensatory time agreement with that representative. An employer cannot, as respondents have done, impose its chosen compensatory time policy on those of its employees who have designated a representative by treating its policy as individual agreements that have been made conditions of employment for those employees.

3. The law of this Court is clear, of course, that in cases such as this, an administrative agency's contemporaneous construction of a statute that it has been charged with interpreting and enforcing is entitled to a heavy presumption of correctness. *See, e.g., Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Aluminum Company of America v. Central Lincoln Util. Dist.*, 467 U.S. 380, 389-90 (1984); *Udall v. Tallman*, 381 U.S. 1, 16 (1965); *Boutell v. Walling*, 327 U.S. 462, 470-72 (1945); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933) (Cordozo, J.); *National Lead Co. v. United States*, 252 U.S. 140, 145 (1920).

Moreover, for a number of reasons, the administrative regulations in this case have a particularly strong claim to judicial deference.

First, in contrast to the usual situation, the Secretary of Labor's regulations were not issued pursuant to a general rulemaking authority but rather were promulgated pursuant to an express congressional command: *viz.*, section 6 of the Amendments Act specifically instructs "[t]he Secretary of Labor . . . [to] promulgate such regulations as may be required" for implementing the FLSA Amendments Act of 1985. P.L. 99-150, § 6; 99 Stat. 790.[5]

[5] The Secretary is, of course, the official with overall responsibility for FLSA enforcement. Under the FLSA, the Secretary is given explicit authority to "supervise the payment of unpaid . . . overtime compensation owing to any employee," and to bring civil suits to enforce § 7's overtime compensation provisions. 29 U.S.C. § 216(c). *See also* 29 U.S.C. § 217. Although employees may bring independent actions without relying on the Secretary—as petitioners have brought an independent action here—the right to bring such an action terminates if the Secretary chooses to file suit. 29 U.S.C. § 216(b). The Secretary also has the statutorily mandated duty of annually reporting to Congress regarding developments under the FLSA and the proposing of amendments to the FLSA. 29 U.S.C. § 204(d).

In this way, Congress *clearly* expressed special confidence and trust in the Secretary's ability to properly elaborate this statute.

In large part this congressional action stems from the extraordinary role that the Secretary of Labor played in the legislative process that generated the Amendments Act.

The FLSA Amendments Act of 1985 was Congress' effort to adapt the FLSA to the particular concerns of public employers and employees after this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).[6] The Secretary's role began almost immediately after *Garcia*, when the Secretary endorsed efforts to amend the FLSA and testified regarding those proposed amendments before one of the relevant congressional committees. In addition, the Secretary—who was responsible for enforcing *Garcia*—had, in consultation with congressional leaders, agreed to delay the enforcement of *Garcia* pending formulation and passage of the Amendments Act. Indeed, throughout consideration of

[6] In *Garcia v. San Antonio Metropolitan Transit Authority*, this Court upheld the constitutionality of Congress' earlier applications of the FLSA to public employers. The 1974 Congress applied the FLSA to virtually all public employment, making no special exceptions analogous to § 7(o) regarding the application of § 7(a)'s broad overtime pay guarantee. *See* 88 Stat. 58, 60 (1974); *see also* 80 Stat. 831 (1966). But this legislative decision had in large part been declared unconstitutional in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the FLSA public employee coverage provision lay dormant until this Court's *Garcia* decision.

the Amendments Act, the Secretary monitored developments to determine whether, in light of legislative progress, continued delay in the enforcement of *Garcia* was a justifiable policy. At the time of the legislation's final passage—nine months after *Garcia*—the Secretary's critical and sensitive role was widely noted.[7]

Second, the Labor Department's interpretation of § 7(o) is fully supported by one of the major documents from the Amendments Act's legislative history, the Report of the Subcommittee on Labor Standards of the House Committee on Education and Labor, H. Rep. 99-331, 99th Cong. 1st Sess. (1985). Indeed, the regulation, in essence, represents the Secretary's acceptance of this Report as the authoritative explanation of § 7(o). The House Report—which accompanied H.R. 3530, the House version of the Amendments Act—extensively commented on the language that would become § 7(o). And, the Report made quite clear that coverage of an employee under § 7(o)(2)(A)(i) does not depend on *the existence of an agreement with the employees' designated representative*, but on *the designation of a representative by the employees*:

> The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and the employee, or notice to the employee, prior to the performance of work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee.
>
> * * * * *
>
> In the case of employees who have no representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding compensatory time in lieu of overtime pay shall be deemed to have reached an agreement or understanding . . . as of April 15, 1986. [H. Rep. 99-331, *supra* at 20.]

Third, the Labor Department's regulation is fully consistent with the overall policy approach to the issue of compensatory time that animated the 1985 legislative deliberations over the Amendments Act. Initially, many public employers and their organizations responded to *Garcia* by requesting that Congress entirely repeal the application of the FLSA's overtime provisions to public employees. The first formal legislative proposal, Senator Nickles' S. 1570, which was introduced in its original form on August 1, 1985, would have exempted public employers from all overtime provisions of the FLSA. *See* Senate Hearings at 1-2 (Sen. Nickles). The Secretary of Labor began by supporting this proposal. *See id.*, at 503-504 (Sec. Brock). But efforts to enact S. 1570 in this form were doomed by the adamant opposition of public employee labor organizations and their allies.[8]

[7] *See Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments of 1985*, 99th Cong., 1st Sess. (1985) ("Senate Hearings") at 502-21 (Secretary Brock); 131 Cong. Rec. H9238 (October 28, 1985) (Rep. Jeffords) (noting assistance of Secretary of Brock and his staff during legislative consideration of Amendments Act); *id.* at H9240 (Rep. Jones) (same); *id.* at H9241 (Rep. Murphy) (same); *id.* at H9917 (Rep. Jeffords) (noting Department of Labor support for final bill); H. Rep. 99-331, 99th Cong. 1st Sess. 11-16 (1985) (correspondence between Chairman of House Subcommittee on Labor Standards and Department of Labor).

[8] Large numbers of public-employee labor organizations mobilized to oppose S.1570 and other efforts to remove public employees from meaningful FLSA coverage. The Executive Director of the AFL-CIO's Public Employee Department summarized the views of myriad labor organizations in a statement at the Senate Hearings: "Our position . . . is a very simple one: we're pleased to be covered by the law; we should have been covered all along, and at this time

To avoid legislative deadlock—and, indeed, to reach an expeditious legislative solution—Congress proceeded along a route that emphasized compromise between public employers and public employee representatives.

As the means to the desired end, public employer groups met with public employee representatives and hammered out a draft bill which set the stage for the final legislative negotiations. *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced Amendments Act). The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO, and the Fraternal Order of Police." 131 Cong. Rec. S14047 (Sen. Nickles): *accord* 131 Cong. Rec. H9238 (Rep. Hawkins). With such broad

---

we seek no changes in the law." Senate Hearings at 157 (testimony of A. Bilik). For other statements by representatives of the many public-employee unions who testified in congressional hearings in opposition to S.1570, as initially drafted, see the following: Senate Hearings, at 164-185 (International Association of Fire Fighters ("IAFF")); *id.*, at 186-201 (Service Employees International Union ("SEIU"); *id.*, at 375-377 (Professional Fire Fighters of Oklahoma); *id.*, at 377-379 (Oklahoma Fraternal Order of Police); *id.*, at 561-562, 568-569, 574-576 (National Association of Police Organizaitons); *id.*, at 562-567 (Fraternal Order of Police); *id.*, at 569-571 (National Troopers Coalition); *Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. (1985) ("House Hearings"), at 85-108 (American Federation of State, County and Municipal Employees); *id.*, at 109-128 (IAFF); *id.*, at 129-140 (SEIU); *id.*, at 151-154 (Amalgamated Transit Union); *id.*, at 155-164 (International Union of Police Association); *id.*, at 179-180 (IAFF); *id.*, at 236-240 (American Federation of Teachers).

support, the compromise bill was quickly passed by Congress.[9]

The Secretary of Labor's understanding of FLSA § 7(o)(2)(A) draws its essence from the bilateral negotiation process between public employer and public employee representatives that led to the drafting and enactment of the provision. Compensatory time agreements, under the Secretary's view of the statute, will govern where there is a negotiated agreement with the employee's designated representative. Such negotiated solutions are a practical guarantee that the terms of the compensatory time arrangement take into account the interests of both the employer and the employees. Absent such agreement there is of course no such assurance.[10] By the same token,

---

[9] As we have briefly mentioned, the Secretary of Labor adopted an FLSA enforcement policy, that, in effect, had created pressure on those seeking legislation to compromise. *See* pp. 13-14, *supra*. In particular, the Secretary agreed at the outset not to attempt to enforce the FLSA against public employers whose coverage was triggered by *Garcia* for six months after the date of the *Garcia* mandate, April 15, 1985. The Secretary also agreed not to seek back wages for that six month period. But, the Secretary did make clear: (1) that private litigation could be initiated at any time regardless of the Secretary's enforcement policy; (2) that such litigation could involve substantial claims against public agencies; and (3) that at the end of six months the Department would have no choice but to begin comprehensive enforcement actions. *See* Senate Hearings at 502-521. Although during Congress' deliberations the Secretary granted congressional leaders extensions of his six-month enforcement deadline, *see* 131 Cong. Rec. H9241, the prospect of backpay liability for public agencies mounting, while the legislative process continued, forced the proponents of legislation to seek compromises in order to obtain quick legislation.

[10] Public employers and public employee representatives agreed in their testimony before Congress that use of compensatory time in lieu of overtime pay, if pursuant to equitable arrangements, could be mutually beneficial. *See, e.g., House Hearings*, 99th Cong., 1st Sess. 155 (1985) (G. Brazgel, IUPA Reg. Dir.) ("Comp time is

under the Secretary's view, the statute's facilitation of compensatory time agreements remains a major special benefit for public employers. The general overtime policy of the FLSA, after all—seeking as it does to protect employees from potentially unfair arrangements and to encourage the broad distribution of work—makes compensatory time agreements entirely unlawful in the private sector. *See* FLSA § 7(a).

Finally, the history of the Department of Labor's rulemaking that generated the rule in question demonstrates that this rule represents the carefully considered and fully-informed judgment of the Secretary, made soon after the legislation was enacted.

Immediately after enactment of the legislation, the Department of Labor commenced the rulemaking process that generated the comprehensive Amendments Act rules, which include the rule here at issue. The Secretary began with a series of meetings with representatives of all interested parties, including public employers and public-employee organizations, to discuss the issuance of proposed regulations. *See* 51 Fed. Reg. 13402 (April 18, 1986) (describing process). Then, before the Amendments Act's effective date, the Secretary issued a set of proposed regulations—including a proposed interpretation of § 7(o)(2)(A), which was substantially the same as the final rule—"to guide State and local government employers and employees in applying the 1985 Amendments." *Id.* at 13404. After full notice and comment procedures—in which the Secretary received extensive comments from public employers, public employee organizations, and congressional leaders prominent in the statute's passage—the final rule was issued, 52 Fed. Reg.

---

vital to policing. Not only is it an important benefit to on the job police officers, but it also is an important tool of sound police management.")

2012 (January 16, 1987), accompanied by full discussion of the comments received.[11]

B. The Contentions of Respondents and the Courts Below

Three lines of argument have been advanced in support of respondents' opposite interpretation of § 7(o)(2)(A). At this juncture, we consider and rebut each one.

1. Respondents contend that the text of FLSA § 7(o)(2)(A) is so clear and unambiguous—and so in

---

[11] We note that the Secretary's interpretation of § 7(o)(2)(A) was fully endorsed by eight of the Amendments Act's principal sponsors and conferees—from both parties and from both the House and the Senate—who filed a submission with the Secretary on this subject during the administrative comment period. This submission explained:

> It is the employees' designation, and not the employer's recognition or attitude toward that representative that is vital. FLSA Section 7(o)(2)(A)(i) was specifically drafted to avoid any requirement of formal recognition. During the consideration of the legislation, specific references were made to a number of states where NLRA collective bargaining style recognition does not exist, but where large numebrs of fire, police, and general public employees belong to labor organizations. We intended the FLSA requirement of an agreement on compensatory time to apply in those situations.
>
> Finally, we understand that some employers or employer representatives may have suggested that the final paragraph following the new FLSA Section 7(o)(2)(B) was intended to provide that the Section (A)(i) requirement of an agreement with the employee representative is not applicable to situations where a regular compensatory time practice was in effect on April 15, 1986. As is clear from the express language of that paragraph, the rule with regard to practices in effect on April 15, 1986, applies *only* to Section (A)(ii) situations in which no representative is involved.
>
> The current proposed regulations properly reflect the language and intent of the new law. [September 26, 1986 letter to Secretary Brock from Senators Metzenbaum, Kennedy, and Stafford, and Representatives Murphy, Hawkins, Jeffords, Clay, and Williams, *reprinted as* Appendix I, Pet. App. 156a-158a.]

favor of an absolute public employer "right" to impose compensatory time arrangements on its employees—as to preclude any need to refer to the Secretary's rule or any other external materials, and, indeed, so clear as to render the Secretary's contrary construction invalid. Brief in Opposition, at 8-10.

Under this view, the text of FLSA § 7(o)(2)(A) simply offers a public employer different forms of "agreements" through which the employer may—as it chooses—implement compensatory-time arrangements of its own formulation. Thus, under subclause (i), an employer may reach an understanding regarding compensatory time with its employees' representatives; *but*, under the first part of subclause (ii), an employer who chooses not to enter any such understanding may nevertheless offer its preferred arrangement to individual employees as a condition of employment; *and*, under the second part of subclause (ii), the employer may (regardless of the existence of any representative) treat any compensatory time policies that existed prior to the effective date of the Amendments Act as an agreement with each employee hired before that date. In essence, under this view, § 7(o)(2)(A) places no constraints at all on public employers, who are to be limited—within otherwise lawful options—only by labor market forces. This is not even a fair reading of the statutory words, much less the only reasonable reading.

First, the words of the provision itself can hardly be said to clearly convey respondents' interpretation. As the Tenth Circuit explained:

> We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [*Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-817 (1989); *see also id.* at 817 n.1.]

Thus, this language is certainly *not so clear and unambiguous* as to justify, by itself, the overturning of the relevant administrative construction.

Second, respondents' interpretation assumes that Congress chose an extremely complex and turgid formulation to state a very simple point. In essence, under respondents view, public employers who wish to follow a particular compensatory-time arrangement have an absolute legal right to do so. If this was its purpose, Congress could easily have stated, in simple and clear terms, that public employers could impose on their employees whatever otherwise valid compensatory time practice the employer preferred, subject to no restrictions under FLSA § 7(o)(2)(A) whatsoever.

Indeed, if this was Congress' purpose, it is not clear why the Legislature drafted and then enacted § 7(o)(2)(A). The remaining provisions of § 7(o), after all, would have the same operative legal effect—*viz.*, allowing employers unilateral discretion to adopt any otherwise lawful compensatory time arrangement—without any further need for a provision containing § 7(o)(2)(A)'s complex language. *See, e.g.*, 29 U.S.C. § 207(o)(1) (public employees may utilize compensatory time "in accordance with this subsection"). Certainly no distinction between different kinds of agreements would need to have been written into law, since nothing would rest on any such distinction. Thus, the very presence of § 7(o)(2)(A) in the statute—with its distinctions between subclause (i) agreements and subclause (ii) agreements—demonstrates that the broadly permissive policy urged by respondents simply is not the policy that Congress wrote into law.

Third, respondents' view of the statute is entirely incompatible with the statute's legislative history. As noted *supra* at pp. 14-15, the House Report unequivocally states that an employer may only utilize individual agreements under subclause (ii) with respect to employees who have *not* designated a representative:

> Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent, as long as it is a representative designated by the employees, the agreement or understanding *must be* between the representative and the employer. . . . Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee. [H. Rep. 99-331, *supra* at 20 (emphasis added).]

The Senate Report as well, although differing with the House Report on some issues, agrees with the House Report in stating that, under § 7(o)(2)(A), employers may *not* utilize individual agreements under subclause (ii) if their employees have a representative. *See* S.Rep. 99-159, 99th Cong. 1st Sess. 10-11 (1985) ("Where employees have a recognized representative, the agrement or understanding *must be* between that representative and the employer. . . . Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee." (emphasis added)).

Thus, *both* the House Report and the Senate Report are *wholly inconsistent* with respondents' position.[12]

---

[12] The principal difference between the House Report language on FLSA § 7(o)(2)(A) and the Senate Report language is on the issue of *when* employees have a representative for purposes of subclause (i). The Senate Report refers to "recognized representative," implying that recognition by the employer is a prerequisite to coverage under subclause (i). S. Rep. 99-159, *supra*, at 10. The House Report expressly rejects this, stating that "a representative . . . need not be a formal or recognized collective bargaining agent, as long as it is a representative designated by the employees." H. Rep. 99-331, *supra*, at 20. Both reports were discussing substantially identical statutory language.

Although respondents have at various times urged that the Senate Report—and not the House Report—provides the correct interpretation of the relevant statutory language, neither the Senate bill, nor the final statute, refers to "recognized" representatives. Moreover, the Secretary of Labor, after a full rulemaking proceeding, concluded that the House Report more accurately captures the meaning of § 7(o)(2)(A), and that "recognition" of a representative by an employer is not a prerequisite to an employee's coverage under subclause (i). Respondents have made no showing as to why the Secretary's conclusion in this regard should be held unreasonable.

2. Respondents have also argued—and the court below agreed—that petitioners' construction of the statute does not take proper account of Texas law, which provides that collective bargaining agreements between public agencies and labor organizations representing public employees have no legal validity unless (in the special case of fire or police employees) the voters of the relevant political subdivision of the State have approved a collective bargaining statute for such employees in a referendum. *See* Tex. Rev. Civ. Stat. Ann., Art. 5154C (*cited at* Pet App. 4a-6a). In the same vein, respondents point out that under Texas law, absent such voter approval, a jurisdiction cannot recognize a union as a collective bargaining representative. *Id.* Since the voters of Harris County have not approved any such referendum, respondents and the court below would have it that these Texas law prohibitions remove petitioners and respondents from FLSA § 7(o)(2)(A)(i)'s coverage; place the parties under subclause (ii); and thus validate respondents' decision to adopt a compensatory time arrangement without any agreement or understanding whatsoever with petitioners' representative. *See, e.g.*, Pet. App. 6a ("because Texas law prohibits the County from entering into a collective bargaining agreement with the Union—and thus there

is no such agreement—the deputies are not covered by subclause (i)"). This argument too lacks merit.

a. Nothing in FLSA § 7(o)(2)(A) or its regulations limits the coverage of subclause (i) to employees covered by state laws that allow public employee collective bargaining agreements, collective bargaining recognition, or any other system of formal or binding public employee labor relations arrangements. Nor does that subclause even require formal collective bargaining arrangements, or any other formal or binding labor relations arrangement that would have any particular legal import under state law.

To the contrary, the statute clearly and carefully refers to arrangements that might be reached pursuant to a "*memorandum of understanding, or any other agreement,*" as well as pursuant to a "collective bargaining agreement." 29 U.S.C. § 207(o)(2)(A)(i) (emphasis added). And, the regulations make clear that "the representative need not be a formal or recognized bargaining agent as long as it is a representative designated by the employees." 29 C.F.R. § 553.23(b)(1). The statute and regulations, after all, are *not* concerned with whether any particular arrangement under subclause (i) is *enforceable as a contract under state law*, but only with whether the arrangement—as a matter of federal FLSA law—allows for a mutually agreeable accommodation between employer and employee on compensatory time-off in lieu of the normal statutory requirement of overtime pay.

As the regulations reflect, the statutory language recognizes that many states do prohibit formal collective bargaining agreements and official union recognition in their public sector labor relations systems. Yet, Congress also recognized that in fact public employees in those states are nevertheless frequently represented in their employment relations by labor organizations, that public employers have in fact treated with such labor organizations, and that the parties to such arrangements—whatever the status of the arrangements may be under state law—should be entitled to seek to reach equitable compensatory time agreements under the FLSA, just as other public employers, employees and labor organizations are privileged to do. *See e.g.*, House Hearings, *supra*, at 57, 59, 85, 142 & 157.

In this regard, the statutory language reflects a policy of according public employees a measure of added compensatory time flexibility but not an unlimited amount. While the FLSA generally prohibits the use of compensatory time, an exception was crafted that emphasizes the desirability of arrangements that are mutually acceptable to public employers and employees. By drafting the provision as it did, the Congress assured that the exception would be available when public employers and employees reach agreements, regardless of the varying public employee relations systems that exist among the states. The statute most assuredly does *not* reflect a policy such as that asserted by respondents: *viz.*, that a public employer in a state without formal collective bargaining may choose not to seek *any* kind of FLSA arrangement under subclause (i), but may nevertheless adopt a compensatory time arrangement of its own liking in lieu of the overtime pay that the FLSA normally requires.

It is not surprising that Congress recognized the prevalence of public employee representation arrangements outside of the context of formal or binding union recognition and collective bargaining. It has been well-documented that informal representation arrangements have been used for decades to attain understandings between public employees (represented by labor organizations) and their employers in states where collectively-bargained contracts are invalid and unenforceable under state law. *See, e.g., Nichols v. Bolding*, 277 So.2d 868 (Alabama, 1973) (despite prohibition on collective bargaining agreements, union and public agency could enter written, non-

binding "memorandum of understanding," which notes that administratively adopted personnel policy reflects consultation and agreement between the parties); *Walker Co. Board of Educ. v. Walker Co. Educ. Ass'n*, 431 So.2d 948, 954-55 (Alabama, 1983) (same); *Board of Educ. v. Scottsdale Educ. Ass'n*, 498 P.2d 578 (Ariz. App., 1972) (despite prohibition on collective bargaining agreements, public agency could negotiate model contract for union's 1200 members and enter contracts with those members, through their union, as long as members consented and contract only contained terms that could be included in individual contracts); *State Board of Regents v. United Packing House Workers*, 175 N.W.2d 110, 113 (Iowa, 1970) (despite prohibition on collective bargaining agreements, public agency may meet with representatives of employees' union, agree to negotiate terms, and adopt those terms in proper legislative manner); *see also* Georgia Op. Att'y. Gen. 75-457, *Legal Status of Public Employee Labor Organizations in Georgia*, at 463-465 (despite prohibition on collective bargaining agreements, public agency could "bargain collectively in the sense of meeting and consulting with union officials about wages, hours, and the conditions of employment of public employees").

Indeed, Texas itself illustrates this pattern. Although a Texas public employer may not enter collective bargaining agreements or officially recognize unions as collective bargaining representatives under state law, public employers may—and often do—enter a variety of less formal and less binding relationships with unions as representatives of their employees. *See generally* Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas—But Were Afraid to Ask*. 13 Houston L. Rev. 291 (1976).

Thus, Texas law explicitly recognizes the "right of public employees to present grievances concerning their

wages, hours of work, or conditions of work . . . through a representative that does not claim the right to strike." Tex. Rev. Civ. Stat. Ann., Art. 5154C(6). The Texas courts have interpreted this as providing public employees an "absolute right" to present their grievances through a union, *Corpus Christi Teachers v. Corpus Christi Indep. School Dist.*, 572 S.W.2d 663, 665 (Texas, 1978); *Sayer v. Mullins*, 681 S.W.2d 25 (Texas, 1984), and the right to act in concert, empowering their union to represent them collectively in bringing and settling group grievances. *Lubbock Professional Firefighters v. Lubbock*, 742 S.W.2d 413, 417-19 (Tex. Civ. App. 1987); *Dallas Indep. School Dist. v. AFSCME*, 330 S.W.2d 702 (Tex. Civ. App. 1959).

Given the wording of FLSA § 7(o)(2)(A)(i)—and given the backdrop of state public employment relations arrangements against which the statute was drafted—the contention that Texas' prohibition of collective bargaining somehow excludes the employees of Texas public employers from the coverage of that subclause has no merit.

3. In the same vein, respondents and the court below contend that in Texas, unlike some other states that prohibit collective bargaining, a public agency is not allowed to enter "any contracts" with a labor organization. *See* Brief in Opposition, at 5, 20 (*citing Beverely v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App. 1956)); Pet. App. 7a ("Texas law prohibits any bilateral agreement between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the county could not enter into *any* agreement with the Union.") Thus, respondents argue, it should not be assumed that Congress intended to make § 7(o)(2)(A)(i) enforceable against a public employer if it "would conflict with Texas law." Brief in Opposition, at 2.

This argument seriously misperceives the nature of FLSA § 7(o)(2)(A)(i) agreements as well as the relationship between FLSA § 7(o) and state law.

First, the basis for the contention by respondents and the court below that no "contracts" or "bilateral agreements" are permitted under Texas law between a labor organization, on behalf of employees, and a public employer rests on the notion that a public employer may not *bind itself* to an outside agent with respect to its employment policies.

> The presentation of a grievance [which a union is permitted to do] is in effect a unilateral procedure, whereas a contract or agreement resulting from collective bargaining must of necessity be a bilateral procedure culminating in a meeting of the minds involved *and binding the parties to the agreement.* [*Beverly v. City of Dallas*, 292 S.W. 2d 172, 176 (Tex. Civ. App. 1956) (emphasis added), *quoted in* Appellees Brief, Fifth Circuit No. 90-2833, at 8.]

But, in contrast to the law of contracts and the law of collective bargaining agreements, *nothing* in FLSA § 7(o)(2)(A)(i) requires agreements that *bind the parties in any way.* A public employer, after reaching such an agreement or understanding, may if it chooses, utilize compensatory time in lieu of overtime pay in conformity with the agreement—or may, if the employer chooses otherwise, reject the agreement at any time and provide overtime pay in conformity with basic FLSA rules. The FLSA, in other words, requires only that, if the public employer chooses not to follow the agreement or understanding, the employer—like any other employer—must instead follow the normal overtime requirements of the FLSA. Nothing in the FLSA grants the employees covered by any agreement any right to hold the employer to the agreement. Thus, § 7(o)(2)(A)(i) *binds no party to any agreement's terms.* While a state may, as a matter of its own law, deem a particular agreement or understanding to be binding, the issue of whether this is so is of no consequence under the FLSA.

For this reason, respondents and the court below err in their premise that an agreement or understanding under subclause (i) of FLSA § 7(o)(2)(A) would conflict with the Texas policy against a public agency binding itself in contract to a labor organization with respect to its labor practices.

Second, if, contrary to what we have just shown, respondents and the court below are right in their assertion that an agreement or understanding pursuant to subclause (i) would conflict with Texas law, the precise conclusion to be drawn therefrom is far from clear. Texas, of course, may formulate its own laws and policies within the bounds of constitutional authority. But if Texas were to prohibit its agencies and local governments from selecting one option otherwise available under a federal regulatory scheme, this would hardly free Texas agencies or local governments from the federal-law consequences of that state law prohibition.

The closest respondents come to offering some explanation as to the relevance of their (erroneous) assertion that a Texas employer could not lawfully enter any agreement under FLSA § 7(o)(2)(A)(i) is to quote the following sentence from the preamble that accompanied the Deparment of Labor's regulations:

> It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices. [52 Fed. Reg. at 2015, *quoted at* Brief in Opposition at 2, 10.]

Respondents attempt to extract from this isolated sentence the theory that subclause (i) is inapplicable where state law prohibits a public employer from reaching any understanding with a representative of the employer's

employees. But respondents misunderstand the import of the quoted sentence.

As the Department of Labor explained in issuing its final regulations, a number of public employers submitted comments during the notice and comment period urging the Labor Department to adopt the principle that respondents here champion. These commentators

> expressed concern with the statement in [proposed] § 553.23(b)(1), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commentors objected to this provision because they believed it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law. . . . They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law. [52 Fed. Reg. 2014.]

In promulgating its final regulations, the Department expressly *rejected* this position. Like the proposed regulations, the final regulations state that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b)(1). And in the accompanying preamble, after reciting the concerns voiced by these public employers, the Department stated:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.
>
> In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified [proposed] § 553.23(c)(1), as suggested by the National Education Association (NEA) to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative. [52 Fed. Reg. 2014-15.]

Viewed in its full context, defendants' attempt to extract from the foregoing a limitation on subclause (i) which would exclude from its coverage any state which does not authorize—or which prohibits—any particular form of labor agreement between public employers and their employees could not be more wrong. Both the language of the regulation and the preamble itself squarely reject such a limitation and make clear that neither "recognition" nor "collective bargaining" is a "necessary condition" for the application of subclause (i); all that is necessary is that "the employees have designated a representative."

The Department's statement that "the question of whether employees have a representative . . . shall be determined in accordance with State or local law and practice." fairly read, simply explains that state law may be relevant in determining when employees "have designated a representative." Thus, when state law creates a method for employee designations of representatives—*e.g.*, through a collective bargaining system based on exclusive representation—that system will be sufficient under § 7(o), and § 7(o) will not be construed in a manner that dis-

rupts the state's designation process. But nothing in the preamble says—or even suggests—that where there is no state law rule on designation, employees cannot have a representative and § 7(o)(2)(a)(i) cannot apply. After all, the preamble's reference to state law falls immediately between two passages explaining that subclause (i) governs all employees who "have designated a representative," and this same point appears in the rule's final text.

In sum, defendants are wrong in contending that a state law prohibition on collective bargaining—or any other particular labor arrangement—would excuse a public employer from its obligation, under the Amendments Act, either to pay overtime compensation to represented employees or to reach an agreement with the employees' representative authorizing the use of compensatory time.

* * * *

Plaintiffs' position on the proper construction of the statute is simple: § 7(o)(2)(A)(i) governs all cases where an employee has designated a representative. It does not matter whether the representative would be prohibited, under state law, from engaging in full collective bargaining, from entering binding agreements, or from otherwise engaging in representation activities beyond the most informal arrangements. In all such cases, until some form of compensatory time agreement or understanding is reached between the representative and the employer—whether oral or written, whether binding as a contract or not—the employer is not relieved of the normal overtime pay requirements of 29 U.S.C. § 207(a).

CONCLUSION

On the basis of the foregoing, this Court should reverse the judgment below.

Respectfully submitted,

MICHAEL T. LEIBIG
(Counsel of Record)
DANIEL G. ORFIELD
ZWERDLING, PAUL, LEIBIG,
KAHN, THOMPSON & DRIESEN
1025 Connecticut Ave., N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5340

Counsel for Lynwood Moreau and all other Petitioners

(8)

No. 92-1

In The

Supreme Court of the United States

October Term, 1992

LYNWOOD MOREAU, *et al.*,

Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

HAROLD M. STREICHER
Counsel of Record
Assistant County Attorney
MURRAY E. MALAKOFF
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-7164
Counsel for Respondents Johnny Klevenhagen, Sheriff of Harris County, and Harris County, Texas

MIKE DRISCOLL
County Attorney
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTION PRESENTED

In response to the court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted Section 7(o) of The Fair Labor Standards Act. Subsection 2(A) of that section provides as follows:

> A public agency may provide compensatory time [. . .] – pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . [29 U.S.C. §207(o)(2)(A)].

Respondent Harris County, Texas is a local governmental entity that is prohibited by state statute from entering into collective bargaining agreements with or otherwise recognizing employee organizations or representatives. The true question presented to this court is whether the provisions of Section 7(o)(2)(A) were intended to preempt or contravene such state legislative proscriptions by compelling a state or local government to recognize and bargain with employee representative groups in order to compensate employees for overtime with compensatory time off in lieu of cash?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs/Appellants/Petitioners are listed in the Brief for Petitioners.

Defendants/Appellees/Respondents are Johnny Klevenhagen, Sheriff of Harris County, Texas and Harris County, Texas.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

CONSTITUTIONAL PROVISION AND STATUTES

REGULATIONS

TABLE OF AUTHORITIES - Continued

No. 92-1

In The

Supreme Court of the United States

October Term, 1992

LYNWOOD MOREAU, *et al.*,

Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

1. In response to this Court's holding in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted The Fair Labor Standards Amendments of 1985 which contain, among other provisions, Section 7(o) of The Fair Labor Standards Act of 1938, as amended (hereinafter referred to as "the FLSA"). Subsection 2(A) of that section sets forth the method and the conditions under which states, counties and cities may compensate their non-exempt employees for overtime hours worked with compensatory time off in lieu of cash. Section (7)(o)(2)(A), codified in 29 U.S.C. §207(o)(2)(A), provides

in relevant part that a public agency, *i.e.* a state, county, city, or local government, may provide compensatory time to its employees "only pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the [state, county or city] and representatives of such employees; or (ii) *in the case of employees not covered by subclause (i),* an agreement or other understanding arrived at between the employer and employee before the performance of the work. 29 U.S.C. §207(o)(2)(A)(i) and (ii) (emphasis added).

2. Respondent Harris County, Texas, (hereinafter referred to as "Respondent County" or "the County") is a political subdivision organized under the laws of the State of Texas and has been the employer of the individually named Petitioners. (J.A. 29)[1].

3. Respondent Johnny Klevenhagen (hereinafter referred to as "the Sheriff" or "Respondent Sheriff") is the duly elected and qualified sheriff of Respondent County. (J.A. 22, 29). Under the provisions of state law, the Sheriff has the power to appoint deputy sheriffs serving in Harris County, Texas. (J.A. 29). When the Sheriff assumed office in January of 1985, he appointed each of the individually named Petitioners to be a deputy sheriff. *(Id.)*

---

[1] References to the Joint Appendix are by page number and are abbreviated "J.A.". References to the Appendix to the Petition for a Writ of Certiorari are by page number and are abbreviated "Pet. App.". References to the Appendix to the Brief in Opposition to the Petition are by page number and are abbreviated "Br. Opp. App.". References to the Record are by the particular document and page number assigned to the document by the Clerk of the District Court.

4. Respondent County, acting through its Commissioners Court, is the budgetary authority for expenditures of the Sheriff and other elected officials. (J.A. 30). The Commissioners Court of Respondent County must approve funds used for payment of deputy sheriffs' salaries. (*Id.*). It may not, however, influence the Sheriff's selection of the individuals to fill the budgeted deputy positions. (*Id.*).

5. Sections 1 and 2 of Article 5154c of the Revised Civil Statutes of Texas state:

> **Art. 5154c. Public employees collective bargaining contracts with organizations representing; strikes; loss of civil service and other rights**
>
> Sec. 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.
>
> Sec. 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees.

TEX. REV. CIV. STAT. ANN. art. 5154c §§1, 2 (Vernon 1987). (Br. Opp. App. 1a).

6. Respondent County, through its Commissioners Court, was never notified that any particular deputy sheriff desired to enter into an agreement with it with respect to the payment of cash for overtime hours worked. (J.A. 30). Respondent County has not entered into any collective bargaining agreement with any union nor with any employee representative organization since no union has complied with the provisions of TEX. REV. CIV. STAT. ANN. art. 5154c-1 §5(b) (Vernon 1987). These provisions require voter approval before a city or county may recognize and bargain collectively with representatives of firefighters and police officers. (J.A. 30).

7. Respondent Sheriff was never notified verbally or in writing that Local 154 of the Harris County Deputy Sheriff's Union represented deputies who desired to reach an agreement on the subject of overtime compensation. (Exhibit 2 to Defendants' Motion for Partial Summary Judgment, R. 138-9).

8. On December 7, 1985, Commissioners Court of Harris County enacted an overtime compensation policy in its personnel regulations. Sections 7.01, 7.02, 9.01, and 9.04 of that policy state as follows:

> 7.01 Effective December 7, 1985, and based on available budgeted funds allocated to a line item for overtime compensation, non-exempt employees shall be compensated for hours of actual work in accordance with applicable federal and state statutes, rules, and regulations regarding overtime compensation for County employees.
>
> 7.02 In lieu of payment for overtime work, compensatory time may be allowed.

> 9.01 For each workweek in which the hours actually worked total more than 40 hours and the employee does not receive additional pay for those hours over 40, the excess is defined as compensatory time.
>
> 9.04 All compensatory time accrued by a non-exempt employee prior to April 15, 1985, shall be calculated on a straight time, hour for hour basis, but that compensatory time accrued after April 15, 1985, shall be calculated at the rate of one and one-half (1-½) times per hour. Effective April 15, 1986, said compensatory time balance shall in no event exceed a 240 hour maximum and shall be carried forward indefinitely, and may be used by the non-exempt employee at anytime approved by the employee's supervisor. Further, that portion of an employee's compensatory time balance that exceeds 240 hours and was accrued prior to April 15, 1986, shall not be recognized or acknowledged after April 14, 1986.

(Exhibit 1 to Defendants' Motion for Partial Summary Judgment, R. 135-136).

9. Under these provisions for non-exempt employees, such as the individually named Petitioners, who are all public employees, all hours worked in excess of 40 hours per work week after April 15, 1985 are calculated at the rate of one and one half times per hour up to and including 240 hours. (J.A. 30-31).

10. A non-exempt employee is permitted to "bank" 240 hours of compensatory time off at this rate. Use of such compensatory time is subject to approval by the

non-exempt employee's supervisor. Hours of compensatory time off that are used are deducted from the banked hours. (J.A. 30).

11. Beginning with the payroll period of April 16, 1986, all hours of overtime worked in excess 40 hours per work week and accumulated over the 240 hours banked are compensated in cash at the rate of one and one half times the employee's base pay as set forth on the County Auditor payroll compensation forms. (J.A. 30-31).

12. Each individually named Petitioner signed a County Auditor payroll compensation form which contains a provision that an employee's signature evidences that he or she had read, understood and accepted the terms and conditions of employment recited in the form and in the foregoing personnel regulations. (J.A. 31). (Exhibit 3 to Defendants' Motion for Partial Summary Judgment, R. 143-147).

13. Contending that the Respondent County's method of providing overtime compensation to non-exempt employees contravened The Fair Labor Standards Amendments Act of 1985, Petitioners initiated suit in the Houston Division of the United States District Court for the Southern District of Texas on April 15, 1988. (J.A. 3-14).

14. Following the filing of cross motions for summary judgment, the District Court entered summary judgment for Respondents, holding that the Respondents' method of compensating deputy sheriffs for overtime through the use of compensatory time did not contravene the provisions of 29 U.S.C. §207(o). (Pet. App. 16a-21a). Rejecting the rationale offered by Petitioners based upon

the decision of the Court of Appeals for the Tenth Circuit in *Local 2203, International Ass'n Firefighters v. West Adams County Fire Dist.*, 877 F.2d 814 (10th Cir. 1989), holding that clause (i) of §207(o)(2)(A) applied exclusively when public sector employees appointed a representative, the District Court reasoned that the provisions of Tex. Rev. Civ. Stat. Ann. art. 5154c prohibited Respondents from collectively bargaining with the individually named Petitioners' designated representative. (Pet. App. 19a-20a). The District Court found that this statutory prohibition triggered the application of the provisions contained in clause (ii) of §207(o)(2)(A), which allows the use of compensatory time by public sector employers in instances where the provisions of clause (i) do not apply. (Pet. App. 19a).

15. The United States Court of Appeals for the Fifth Circuit affirmed in *Moreau v. Klevenhagen*, 956 F.2d 516 (5th Cir. 1992) (Pet. App. 1a-14a). This Court granted certiorari on October 5, 1992, in ___ U.S. ___, 113 S.Ct. 51 (1992).

SUMMARY OF ARGUMENT

1. The Fifth Circuit's decision is correct and should be affirmed. 29 U.S.C. §207(o)(2)(A) is not ambiguous, and the plain language of this statute controls its construction. "The reference in subsection (2)(A)(ii) to 'employees not covered by subclause (i)' can only be to employees who are not the subjects of an agreement between their [county governmental employer] and their representative." *Wilson v. City of Charlotte, N.C.*, 964 F.2d

1391, 1397 (4th Cir. 1992) (*en banc*) (Luttig, J. concurring). When this Court finds that the terms of a statute are unambiguous, judicial inquiry is complete. *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

2. The plain meaning of 29 U.S.C. §207 (o)(2)(A) is clear and results in the conclusion that, in the absence of an agreement or understanding being reached between a governmental employer and the representative of employees providing for the use of compensatory time in lieu of cash, the employer may, as authorized by clause (ii), compensate its employees for overtime with compensatory time through individual agreements arrived at between the employer and employee before the performance of the work. Although, when this Court finds that the terms of a statute are unambiguous, "judicial inquiry is complete," *Burlington*, 481 U.S. 454, 461 (1987), " . . . any lingering doubt as to its proper construction may be resolved by examining the legislative history of the statute . . . . " *United States v. Clark*, 454 U.S. 555, 561 (1982). An examination of the legislative history of Section 7(o)(2)(A) of the FLSA, to determine the existence of a legislative intent contrary to the plain words of that statute, reveals that the Senate Committee Report is more congruent with the plain words used. Under this Court's decisional authority in construing amendments to the FLSA, the legislative history of the body in which the enacted statute originates is deemed the more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956). The Senate Committee interpretation of S. 1570, the original Bill, therefore supports the plain meaning of the enactment and further supports the conclusion that when no agreement or understanding has been reached between the employer and the representative of the employee, the county governmental employer may compensate its employees with compensatory time in accordance with individual agreements arrived at between the employer and employee.

3. Petitioners' main contention in their brief on the merits is that under 29 U.S.C. §207(o)(2)(A)(i), when state or local government employees merely designate a representative, the state or local government employer must either reach an agreement or understanding with the representative with respect to compensatory time, or pay cash for overtime. Not only does this interpretation go against the plain meaning of the statute as well as the legislative history, the interpretation is untenable as it ignores state statutes governing the employment relationships of state and local governments with their employees. Under Petitioners' proposed interpretation of Section 7(o)(2)(A), that statute would, in effect, preempt state enactments governing employee relations between states, cities or counties and their employees when they wish to use compensatory time in lieu of cash.

Consideration of whether an Act of Congress preempts state laws "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress". . . . *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). Section 1 of Article 5154c[2], a Texas Statute enacted in 1947, declares it "to be against the public policy of the State of Texas for any official or group of officials of the State [or] of a County . . . to enter into a collective bargaining contract with a labor organization respecting the wages, *hours* or conditions of employment of public employees . . . " (*emphasis supplied*). Section 2 of Article 5154c states that "[i]t is declared to be against the public policy of the State of Texas for any such official or group

---

[2] Tex. Rev. Civ. Stat. Ann. art. 5154c (Vernon 1987).

of officials to recognize a labor organization as the bargaining agent for any group of public employees." These sections are not in conflict with 29 U.S.C. §207(o)(2)(A). Respondent Harris County and Petitioners have complied with 29 U.S.C. §207(o)(2)(A)(ii) by having already entered into individual agreements before the performance of work. Section 5 of Article 5154c-1[3], known as the Fire and Police Employee Relations Act, allows for the holding of an election to adopt the Act. Were such an election to be held where a majority of the votes cast favored the adoption of the Act, the Petitioners could then, pursuant to the Act, organize and bargain collectively with Respondent employer. This Act also does not conflict with 29 U.S.C. §207(o)(2)(A).

Finally, the Secretary of Labor's regulations do not weigh against the plain meaning interpretation of 29 U.S.C. §207(o)(2)(A). The Secretary has stated "[i]t is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) *shall be determined in accordance with state or local law and practices.* 52 Fed. Reg. 2014-2015 (1987) (emphasis supplied).

ARGUMENT

I.

THE LANGUAGE OF SECTION 7(o)(2)(A) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED, IS NOT AMBIGUOUS, BUT RATHER, CLEAR AND UNEQUIVOCAL

In their brief on the merits, Petitioners, relying upon the reasoning contained in the opinion of the Court of Appeals

[3] TEX. REV. CIV. STAT. ANN. art. 5154c-1, §5 (Vernon 1987).

for the Tenth Circuit in *Local 2203, International Ass'n of Firefighters v. West Adams County Fire Dist.*,[4] argue that the provisions contained in Section 7(o)(2)(A) of The Fair Labor Standards Act of 1938 (the FLSA) are ambiguous and therefore require judicial inquiry into the intent of Congress in enacting that particular subsection. (Brief for Petitioners at p. 10). In particular, quoting from the *West Adams* opinion, Petitioners state: "it is unclear whether [the phrase 'employees not covered by subclause (i)'] means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative".[5] (*Id.*)

The Petitioners' and Tenth Circuit's conclusion that an ambiguity exists in the language of the Congressional enactment contravenes this Court's well established commitment to the contrary principle that, "[i]n short, the plain language of [a statute] controls its construction, at least in the absence of 'clear evidence' . . . of a 'clearly expressed legislative intention to the contrary' " . . . *Bread Political Action Comm. v. Federal Election Comm.*, 455 U.S. 577, 581 (1982). The principle has also been enunciated thus: "[u]nless exceptional circumstances dictate otherwise, '[w]hen [this court] find[s] the terms of a statute unambiguous, judicial inquiry is complete.' " *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Hence, this Court has noted that:

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' *the language of the statute itself 'must ordinarily be regarded as conclusive.'* "

[4] 877 F.2d 814 (10th Cir. 1989).

[5] 877 F.2d 816-17.

Burlington, 481 U.S. at 461 (quoting *United States v. James*, 478 U.S. 597, 606 (1986)) (emphasis added). *See also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Under this Court's prescribed method for analyzing congressional enactments, the plain language of subclauses (i) and (ii) of Section 7(o)(2)(A) and the interposition of a disjunctive article between them serve to clearly define the two instances in which a state, city, county or local governmental body may compensate their non-exempt employees for overtime hours through the use of compensatory time in lieu of cash. In the first instance, subclause (i) provides that a state or local governmental entity may do so "pursuant to" the terms of "a collective bargaining agreement, memorandum of understanding or any other agreement" between the governmental entity and employees' representative. 29 U.S.C. §207(o)(2)(A)(i). Subclause (ii) of Section 7(o)(2)(A) provides that where employees "are not covered" by the instances enumerated in subclause (i), *i.e.*, by the terms of a collective bargaining agreement, memorandum of understanding or any other agreement between the governmental employer and the employees' representative providing for compensatory time in lieu of cash, the state or local governmental body may utilize compensatory time pursuant to "an agreement or understanding" between it and the employee prior to the performance of the work. 29 U.S.C. §207(o)(2)(A)(ii).

Both the Court of Appeals below and the Court of Appeals for the Eleventh Circuit, following this Court's clear command to accord the words of congressional enactment their plain meaning, have found no ambiguity

in the provisions of Section 7(o)(2)(A). (Pet. App. 5a). In particular, the Court of Appeals below found that the Eleventh Circuit's reasoning and decision in *Dillard v. Harris*[6] was "instructional in the disposition of the case." (*Id.*) In *Dillard*, the Court of Appeals for the Eleventh Circuit noted: "the statute on its face is plain and the legislative history does not mandate a contrary interpretation." 885 F.2d at 1552.

The most cogent application of this Court's plain meaning rule in construing Section 7(o)(2)(A), however, is not contained in the majority opinion of any Court of Appeals, but rather in the concurring opinion to the *en banc* decision of the Court of Appeals for the Fourth Circuit in *Wilson v. City of Charlotte, N.C.*[7] Agreeing with the Court's holding that a state statutory proscription against collective bargaining by public sector employees makes the provisions of subclause (i) of Section 7(o)(2)(A) inapplicable and, as a consequence, triggers the application of subclause (ii) of Section 7(o)(2)(A), a member of that Court reasoned thus:

> The statute [29 U.S.C. §207(o)(2)(A)] is not at all ambiguous . . . . The reference in subsection (2)(A)(ii) to "employees not covered by subclause (i)" can only be to employees who are not the subjects of an agreement between their agency and their representative. It cannot grammatically (and does not logically) refer to employees who are unrepresented because the compound objects of the prepositional phrase

---

[6] 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 210 (1990).

[7] 964 F.2d 1391 (4th Cir. 1992) (*en banc*).

> "pursuant to" in subsection (i) are the forms of agreement. The subsection does not denominate a class of represented employees; it identifies certain agreements (in addition to those in subsection (ii)) that will satisfy the requirement in subsection (2)(A) [of Section 7(o)] that compensatory time be provided pursuant to an agreement.

Wilson v. City of Charlotte, N.C., 964 F.2d 1391, 1397 (4th Cir. 1992) (*en banc*) (Luttig, J. concurring) (citation omitted).

Under this reasoning, the plain meaning of the words contained in the statute clearly compel a finding of no ambiguity.

II.

THE PLAIN MEANING OF SECTION 7(o)(2)(A) OF THE FAIR LABOR STANDARDS ACT IS NOT CONTRAVENED BY A CLEARLY EXPRESSED LEGISLATIVE INTENTION TO THE CONTRARY

Petitioners, contending in their brief that Respondents' view of Section 7(o)(2)(A) is contrary to the statute's legislative history, essentially argue against the use of this Court's plain meaning doctrine to interpret Section 7(o)(2)(A). (Petitioner's Brief pp. 21-22). When their argument is couched in terms of the corollary to this Court's plain meaning doctrine, they are in effect arguing that examination of congressional intent in enacting Section 7(o)(2)(A) reveals a meaning contrary to the very words Congress used in the statute itself. Basing their argument on the House Committee Report, they assert that when employees designate a representative, the FLSA requires

a public employer's recognition of that representative rather than recognition and an attendant agreement between the state or local government employer and employee representative as preconditions to the use of compensatory time in lieu of cash. (Brief for Petitioners pp. 14-15). Petitioners further argue that even the Senate Committee Report supports the existence of a statutory ambiguity because of the existence of a congressional intent contrary to the plain words of the statute. (Brief for Petitioners at p. 22).

A more logical reading of the Senate Report cited by Petitioners, however, compels a contrary conclusion.

Petitioners' quotation of the Senate Committee's Report on The Fair Labor Standards Amendments Act of 1985 omits the very first line of the portion of the report addressing agreements or understandings for the payment of compensatory time by states and local governments. The report, including the section omitted by the Petitioners, reads as follows:

> The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee.

S. Rep. No. 159, 99th Cong., 1st Sess. 10 (1985).

Petitioners' interpretation of this Committee Report would have this Court read the report as stating that where employees have recognized a representative, the agreement for compensatory time must be between the public sector employer and the representative. The juxtaposition of the words "a" and "recognized" does not appear in the text of the Senate report. Thus, the phrase "where employees have recognized a representative" is necessary to the Petitioners' argument. Instead of using that phrase, Congress uses the phrase "where employees have a recognized representative." The Senate Committee's use of this phrase supports Respondents' position that there is an absence of a legislative intent contrary to the plain words it used in Section 7(o)(2)(A). Nowhere in the statute do the words "designate a representative" appear, which phrase is crucial to the Petitioners' interpretation of the statute.

Respondents contend that the more reasonable reading of the Senate Committee Report requires fulfillment of two conditions for the payment of compensatory time to employees under the terms of subclause (i) of Section 7(o)(2)(A): first, the employer's recognition of the employees' representative; second, an agreement or understanding between the governmental employer and the representative it recognizes. In the absence of both conditions, the provisions of subclause (ii) rather than subclause (i) of Section 7(o)(2)(A) control.

Petitioners also rely heavily upon the language in the House of Representatives Committee Report on H.R. 3530. In effect they state that the House Report creates a congressional intent contrary to the plain words of Section 7(o)(2)(A). They argue that the intent of Congress in

construing Section 7(o)(2)(A) must be derived from this committee report rather than the report of the Senate Committee on S. 1570, the Senate version of the bill which was eventually enacted as Section 7(o)(2)(A) of the FLSA. (Petitioners' Brief at pp. 14-15, 22). The House Committee Report states, in relevant part, that where the public employees have designated a representative, the agreement must be with the employees' designated representative rather than the individual employees. H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985). Their reliance upon the House Committee Report is, however, misplaced. This Court has held, in construing the Portal to Portal Amendments to the FLSA[8], that where the House history of an enactment conflicts with that of the Senate, the history of the body in which the enacted bill originated is deemed to be more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956).

Here, the Senate Bill, S. 1570, containing the House Amendments relating to compensatory time limits, substitute employment, protections against discrimination, payment for unused compensatory time upon termination of employment and liability of possessions and territories for violations of overtime is the bill which was ultimately enacted into The Fair Labor Standards Amendments of 1985. *See* H.R. Rep. No. 357, 99th Cong., 1st Sess. 2 (1985). The language contained in the original Senate Bill, S. 1570, is virtually identical to that used in Section 7(o)(2)(A). *See* S. Rep. No. 159, 99th Cong., 1st Sess. 2, 20 (1985). Hence, under this Court's reasoning in *Steiner*, the

---

[8] 29 U.S.C. §252.

Senate Committee interpretation of the original enactment is clearly entitled to more deference in determining whether a legislative intent contrary to the actual words of the enactment exists. At least one Court of Appeals in applying this analysis found no legislative intention contrary to the plain words used in Section 7(o)(2)(A). *Dillard v. Harris*, 885 F.2d 1549, 1552 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 210 (1990).

The reasoning employed by the Court of Appeals for the Eleventh Circuit in *Dillard* is by far the most congruent with this Court's plain meaning rule.

III.

THE PETITIONERS' PROPOSED INTERPRETATION OF SECTION 7(o)(2)(A) OF THE FAIR LABOR STANDARDS ACT WOULD EFFECTIVELY PREEMPT STATE STATUTORY ENACTMENTS GOVERNING EMPLOYMENT RELATIONSHIPS BETWEEN STATES OR LOCAL GOVERNMENTS AND THEIR EMPLOYEES IN INSTANCES IN WHICH EMPLOYEES UNILATERALLY DESIGNATE A REPRESENTATIVE

Petitioners' main contention in their brief on the merits is that, under Section 7(o)(2)(A)(i), when employees of a public sector employer such as a state, city and county designate a representative to reach an agreement with respect to compensatory time, their designation of the representative rather than the existence of an agreement between the employee representative and the public sector employer governs when compensatory time may be paid in lieu of cash. (Petitioners' Brief at p. 9). Stated in other terms, Petitioners argue that under the

FLSA Amendments of 1985, when state or local government employees designate a representative, the state or local government has only two choices: either recognize the representative and reach an agreement for the use of compensatory time, or pay cash for overtime at the rate prescribed by the FLSA. (*Id.*).

In addition to ignoring the plain meaning of the words Congress used in Section 7(o)(2)(A), this proposed interpretation ignores the state statutes governing the employment relationships of state and local governments with their employees, and more importantly, this Court's recently stated principles regarding the preemptive effect to be accorded to congressional enactments.

A. In Enacting The Fair Labor Standards Amendments Act of 1985, Congress Did Not Intend to Entirely Preempt the Area of a State or Local Government's Relationship With Its Employees By Requiring Employer Recognition of Employee Representatives as a Precondition to the Use of Compensatory Time

This Court has had recent occasion to reemphasize the principles governing the preemptive effect to be accorded Acts of Congress under the Supremacy Clause of the United States Constitution[9], by stating:

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are]

---

[9] U.S. Const. Art. VI cl. 2.

> not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress" . . . .
>
> Accordingly, " '[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis . . . .
>
> Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." . . . In the absence of an express congressional command, state law is preempted if that law actually conflicts with the federal law, . . . or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' "

Cipollone v. Liggett Group, ___ U.S. ___, 112 S.Ct. 2608, 2617 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). Here, because the FLSA and the 1985 Amendments contain no express preemption clause, the Court must first examine the Congressional purpose in enacting the 1985 Amendments to determine whether it intended for the Amendments to occupy entirely the field of a state or local government's relations with its employees or supplant state or local legislative enactments governing a state, city or county employer's relations with its employees.

The Senate Committee Report on S. 1570, the bill eventually enacted into the FLSA Amendments Act of

1985, provides this Court with a beginning point. Particularly significant are the Committees' comments on the need for the enactment of the Amendments. The Committee states in relevant part:

> The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.
>
> At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism . . . .
>
> The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time-off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements – frequently the result of collective bargaining – reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

S. Rep. No. 159, 99th Cong., 1st Sess. 7, 8 (1985).

The House Report on H.R. 3530 contains practically identical manifestations of congressional deference to the "principles of cooperative federalism" and "the particular needs and circumstances of the states and their political subdivisions." *See* H.R. Rep. No. 331, 99th Cong., 1st Sess. 17 (1985).

The Congress' explicit exemption of states and local governments from the operation of the provisions of the National Labor Relations Act,[10] governing an employer's recognition of employee representatives and the duty to bargain in good faith, provides yet another expression of that legislative body's intention to leave the subject of employment relations between states or their political subdivisions and their employees to the province of state lawmakers.[11] *See NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600 (1971).

Under Petitioners' strained interpretation of Section 7(o)(2)(A) of the FLSA, if a state or political subdivision desired to compensate its employees with compensatory time for overtime hours worked, it would be required to recognize the employee's designated representative and bargain with that representative and reach an accord with respect to overtime compensation, in spite of clear congressional expressions to the contrary.

---

[10] The National Labor Relations Act (the NLRA) is codified in 29 U.S.C. §§141-187.

[11] Section 2 of the NLRA provides in relevant part:
> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, *but shall not include . . . any State or political subdivision thereof* . . . . 29 U.S.C. §152(2). (emphasis supplied).

B. The Provisions of Tex. Rev. Civ. Stat. Ann. art. 5154c Do Not Conflict With Section 7(o)(2)(A) of The Fair Labor Standards Act, But Rather Can Be Read Together

The preemption doctrine set forth *ante* at pp. 19-20 requires this Court's analysis of the particular state enactment to determine whether it conflicts with the congressional enactment in question. This Court has stated:

> If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.
>
> *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (*citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)); *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Section 1 of Article 5154c expressly declares it . . . "to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, *hours* or conditions of employment of public employees . . . " Tex. Rev. Civ. Stat. Ann. art. 5154c, Sec. 1 (Vernon 1987). Section 2 of that statute declares that recognition of a labor

organization as the bargaining agent for employees is also contrary to the state's public policy. *Id.* §2.

Section 6 of the Act provides that employees may present grievances through a representative. *Id.* §6.

This state statute has been construed by the Texas courts as allowing unions as representatives of public sector employees to present unilateral grievances while at the same time forbidding a public entity's recognition of a labor organization and the reaching of an attendant bilateral agreement between that labor organization and the public employer. *Dallas Indep. Sch. Dist. v. Local 1442, American Fed'n of State, County and Mun. Employees,* 330 S.W.2d 702 (Tex. Civ. App. – Dallas 1959, writ ref'd n.r.e.) (*citing Beverly v. City of Dallas,* 292 S.W.2d 172 (Tex. Civ. App. – El Paso 1956, no writ)).

Under the provisions of Section 5 of Article 5154c-1, known as The Texas Fire and Police Employee Relations Act, firefighters and police officers may organize and collectively bargain with their government employer upon an affirmative adoption of the Act's provisions pursuant to an election.

This Court must determine under the test set forth above, whether there is a conflict between the "no recognition no contract" clauses of Art. 5154c and the plenary provisions of Section 207(o)(2)(A). Respondents submit that there is not.

Here, under this state enactment, Respondent County and Respondent Sheriff are unable to recognize or reach an agreement with an employee representative for the use of compensatory time without the approval of voters.

However, they may lawfully compensate their employees with compensatory time in lieu of cash under Section 7(o)(2)(A)(ii) of the FLSA. Thus, under this court's pre-emption test, a state, city or county may easily comply with both the prohibitions contained in Article 5154c and the requirements of Section 7(o)(2)(A) of the FLSA for the payment of compensatory time in lieu of cash by reaching an agreement with the individual employee under subclause (ii).

Petitioners argument that employee recognition of a representative under subclause (i) precludes the payment of compensatory time absent an agreement also serves to give preemptive effect to those state enactments which, like the NLRA, would require public employees to elect an exclusive bargaining representative, to bargain in good faith, and which contain provisions for the filing of unfair labor practices complaints with the appropriate state agency.[12]

---

[12] After reviewing applicable State statutes, Respondents have found that forty jurisdictions have statutes that mandate either collective bargaining or good faith "meet and confer" negotiations between the State and local governments or political subdivisions thereof and at least one distinguishable group of public employees or their representatives. Those states are Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Washington, Wisconsin and Wyoming. Two states, Arizona and Arkansas, have statutes that permit, but do not mandate, collective bargaining between the governmental unit and at least one distinguishable group of

(continued on next page)

C. The Federal Regulations Governing the Use of Compensatory Time Were Not Intended to Contravene State Enactments

In its original uncodified version, the FLSA Amendments Act of 1985 directed that the Secretary of Labor promulgate regulations to implement the Act's provisions. In particular, Congress stated:

> The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall, before such date, promulgate such regulations as may be required to implement such amendments.

Pub. Law 99-150, 99 Stat. 790 §6 (1985).

The Secretary of Labor promulgated the final version of these regulations on January 16, 1987. The regulation

---

(continued from previous page)

public employees or their representative. Two states, Mississippi and Utah, have no statutes speaking to the issue of collective bargaining rights of public employees. Two states, South Carolina and Tennessee, have statutes providing for public employee grievance procedures. Virginia has no statutory provision addressing collective bargaining rights for public employees. However, Virginia's Attorney General has issued an opinion forbidding collective bargaining with public employees. West Virginia has no statute addressing collective bargaining rights for public employees, but its Attorney General has issued an opinion mandating meet and confer negotiations. North Carolina has a statute that forbids any collective bargaining with public employees. Nevada has a statute that prohibits collective bargaining representation on behalf of State employees unless the representative is recognized by the State, in which case collective bargaining becomes mandatory. *See* [4 & 4A State Laws] Lab. Rel. Rep. (BNA); *See also* RICHARD C. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR, pp. 53-73 (Marcel Dekker 1984).

which governs the use of agreements to provide compensatory time in lieu of cash states in relevant part:

> *Agreement or understanding between the pubic agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

29 C.F.R. §553.23(b).

Section 553.23(c) states:

> *(c) Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept.

29 C.F.R. §553.23(b). While at first glance the words of these regulations may seem to support Petitioners position that employee designation of a representative precludes an individual agreement under subclause (ii) of

Section 7(o)(2)(A), the Secretary of Labor, addressing the spectre of giving preclusive effect to these regulations, stated thus:

> The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggested that "recognized representative" mean [sic] an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.
>
> The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention *that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.*

52 Fed. Reg. 2014-2015 (1987). (emphasis supplied).

Hence, despite the literal words of the regulation there is a manifest intention of the Department to construe the agreement with a representative clause under

subclause (i) of Section 7(o)(2)(A) in accordance with state law.

Even if this court were to assume that the regulations promulgated by The Secretary of Labor are consistent with the Petitioners' position that employee designation of a representative compels a public employer's recognition of an employee representative and an attendant agreement to pay compensatory time as the only alternative to the payment of cash under the FLSA, such regulations would contravene the stated intent of congress not to preempt the states' authority to regulate labor relations not explicitly addressed by or in conflict with the amendments. As this Court has stated:

> On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction". If we can do so that interpretation must be given effect and the regulations at issue must be fully consistent with it.

NLRB v. Local 23, Amalgamated Food and Commercial Workers, 484 U.S. 112 (1987) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987)). *See also Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984).

Here, if the regulations were construed as the Petitioners contend, they would clearly contradict both the plain words used in the statute and the congressional intent of the statute by invalidating both state proscriptions against the recognition of employee representatives

and state laws which govern the procedures for the recognition of employee representatives.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HAROLD M. STREICHER
Counsel of Record
Assistant County Attorney
MURRAY E. MALAKOFF
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-7164
Fax No. (713) 755-8924
Counsel for Respondents

MIKE DRISCOLL
County Attorney
Of Counsel

No. 92-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

MICHAEL T. LEIBIG
(Counsel of Record)
ZWERDLING, PAUL, LEIBIG,
KAHN, THOMPSON & DRIESEN
1025 Connecticut Ave., N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5340

Counsel for Lynwood Moreau and all other Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

ARGUMENT

A. Responednt's "Plain Meaning" Argument

Respondents and their supporting *amici curiae* all assert that the statutory provision at issue—§ 7(o)(2)(A) of the Fair Labor Standards Amendments Act of 1985 ("Amendments Act"), 29 U.S.C. § 207(o)(2)(A)—has a "plain meaning" that is so clear and unequivocal as to render illegitimate *any reference whatsoever* to the relevant administrative understanding, *viz.*, to the Department of Labor's regulation that supports petitioners' position. *See, e.g.* Brief of Respondents ("Resp. Br.") at 10-18; *Amicus* Brief of Missouri ("Mo. Br.") at 3-8; *Amicus* Brief of the National Association of Counties, *et al.* ("NACo Br.") at 7-10.

Specifically, respondents and their *amici* contend that the language of subclauses (i) and (ii) clearly and unambiguously indicates that an employee is "covered" by subclause (i)—and thus not within subclause (ii)—*only*

when his employer and his representative conclude an agremeent that allows for compensatory time off in lieu of overtime. Whenever there is no agreement with a representative that permits employer use of compensatory time, the employer may—regardless of the reason there is no agreement and even where the employees have a representative—implement the employer's chosen compensatory time policy through individual agreements under subclause (ii), which may be imposed on employees as conditions of employment.[1]

The only point regarding the statutory text that is clear is that this "plain meaning" contention is without any merit.

1. Section 7(o)(2)(A) draws distinctions based on the phrases "employees . . . covered by subclause (i)" and "employees described in" subclause (ii). But neither of these subsections refers to or describes any defined class of employees. Rather, subsection (i) refers to various kinds of agreements that an employer might enter with employees who are represented by some sort of representative. And, subsection (ii) refers only to "employees not covered by subclause (i)" and to agreements that an employer might enter directly with an employee, *viz.*, in the absence of a representative. As we noted in our initial brief, the Tenth Circuit, therefore, concluded as follows:

> We find the language . . . to be ambiguous. Subclause (ii) applies to 'employees not covered by subclause (i).' However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [*Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-17 (1989); *see also* Pet. Br. 20-21)].[2]

[1] Respondents also assert that the petitioners in this case never designated representatives for purposes of reaching § 7(o)(2)(A)(i) agreements. Resp. Br. 4. Given that petitioners have alleged to the contrary, and given that this case arises in the context of summary judgment motions, respondents' assertion on such a hotly disputed factual issue is improper. The Fifth Circuit properly decided this case on the opposite premise, accepting as true the allegations of the complaint. *See* Pet. App. 3a (stating that each petitioner designated a representative and the employer instituted its pay system without reaching any agreements with that representative).

2. It is equally to the point that respondents' proffered interpretation of § 7(o)(2)(A) makes the provision *entirely permissive*. On respondents' view, public employers would be free to implement their chosen compensatory time policy in lieu of overtime whenever the public employer chooses to do so simply by exercising the right to refuse to deal with the representatives of its employees on the issue of compensatory time. *See, e.g.*, Resp. Br. 12; Mo. Br. 5; NACo Br. 10. This result conflicts with the structure and design of this statute in at least three major ways.

First, respondents' interpretation assumes that Congress chose to draft § 7(o)(2)(A) in extremely complex and turgid statutory language even though Congress' goal was to convey an extremely simple concept: *viz.*, that public employers may use otherwise lawful compensatory time provisions whenever and however they

[2] Respondents and *amici* quote a passage from a concurring opinion in *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) (*en banc*), in which Judge Luttig finds no ambiguity "because the compound objects of the prepositional phrase 'pursuant to' in subsection (i) are the forms of agreements enumerated therein." *Id.* at 1397. *See* Resp. Br. 13-14; NACo Br. 10. Be that as it may, the object of the introductory prepositional phrase in subsection (ii)—*viz.*, "employees not covered by subclause (i)"—is "employees", not "agreements", and all "employees" referred to in subsection (i) are employees with representatives, since the prepositional phrase "between the public agency and representatives of such employees" modifies all the "agreements" in the subsection. That being so, neither Judge Luttig nor respondents explain why Judge Luttig's grammatical point (any more than our grammatical point) should conclusively determine the issues in this case.

choose to do so. If this was Congress' judgment, the almost 150 words used in § 207(o)(2)(A) were far from necessary. And, Congress certainly did not need to draw a distinction between different kinds of compensatory time agreements—as §§ 7(o)(2)(A)(i) and (ii) and as the subsequent paragraph dealing with transitional issues go to great lengths to do—since nothing of consequence would depend on any such distinctions.

Second, if respondents are correct in their interpretation, Congress simply would have had no reason to include *any* provision at all where § 7(o)(2)(A) appears in the statute. After all, § 7(o)(1)—the section immediately preceding § 7(o)(2)(A)—*standing alone* would have accomplished precisely the result respondents urge here. *See* § 7(o)(1), 29 U.S.C. § 207(o)(1) (public employers may use "in accordance with this subsection and in lieu of overtime compensation, compensatory time off"). Thus, respondents' construction of § 7(o)(2)(A) renders § 7(o)(1) and § 7(o)(2)(A) entirely redundant. *Compare Moskal v. United States*, —— U.S. ——, 59 L.W. 4025, 4027 (1990) (court should resist interpreting a statutory provision in a manner that renders statutory language surplusage); *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 562 (1990) (same); *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 837 (1988) (same); *Bowsher v. Merck*, 460 U.S. 824, 835 n.10, 836 (1983) (same).

Third, as drafted, § 7(o)(2)(A) is clearly written in the form of a provision intended *to limit* the discretion of public employers. The provision states that "[a] public agency may provide compensatory time . . . *only*" (emphasis added) under those circumstances that the provision describes—a formulation that strongly implies an intent to prohibit some class of employer efforts to provide compensatory time. Yet, respondents' construction leaves public employers free to utilize whatever otherwise lawful compensatory time program those em-

ployers might choose, regardless of how § 7(o)(2)(A) might apply, leaving the word "only" to serve no limiting function. Thus, once again, respondents' construction is in tension with the statutory design, converting seemingly significant language into mere surplusage. *See Bowsher v. Merck*, *supra*, at 835 n.10, 836; *see also Moskal*, *supra*; *Pennsylvania Public Welfare Dept.*, *supra*; *Mackey*, *supra*.

Under this Court's jurisprudence, any of these points would be sufficient reason to reject the notion that respondents' interpretation of § 7(o)(2)(A) constitutes the unmistakably "plain meaning" of the provision. As recent decisions have emphasized, application of this Court's "plain meaning" rule requires this Court to determine if there is an "unambiguously expressed intent of Congress" by "look[ing] to . . . the language and design of the statute as a whole." *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). *Cf. National Railroad Passenger Corp. v. Boston & Maine Corp.*, —— U.S. ——, 60 L.W. 4268, 4271 (1992) ("Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation . . . .").

3. Even if none of the problems we have just discussed existed—so that the interpretation of § 7(o)(2)(A) urged by respondents was far more compatible with the design of the statute than it is—it would still be appropriate for this Court to examine the provision's legislative history in order "to determine . . . whether there is a clearly expressed legislative intention contrary to" the proffered "plain meaning." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). *See also United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Comm'n. v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case, there is such a clear expression of legislative intent contrary to respondents' position. Specifically, the committee reports of *both* the House and the Senate squarely reject the interpretation urged by respondents.

Although there are differences between the House Report and the Senate Report, both clearly state that subsection (i) will apply—and therefore subsection (ii) will *not* apply—in any case in which employees *have a representative*. *See* note 3, *infra*. In such cases the public employer is denied the option of imposing individual agreements. *See* H. Rep. 99-331, 99th Cong., 1st Sess. 20 (1985) (*reprinted at* Pet. App. 36a); S. Rep. 99-159, 99th Cong., 1st Sess. 10-11 (1985) (*reprinted at* Pet. App. 101a). *See generally* Pet. Br. 22 (quoting and discussing House and Senate Reports). Both reports show that if a public employer cannot reach an agreement with its employees' representative on the use of compensatory time, the employer would be required to pay for overtime in cash, as would any private sector employer. The employer would not be able—as respondents contend—simply to ignore the absence of an agreement with the representative and unilaterally impose individual agreements on its employees as individuals.[3]

Given that both legislative reports are firmly united in rejecting the purely permissive construction that re-

[3] To be clear, we add that the principal difference between the House Report and the Senate Report is on the issue of *when* employees are deemed to have a representative for purposes of being "covered by subclause (i)." The Senate Report refers to "recognized representative," implying that recognition by the employer or by operation of state law is a prerequisite to coverage under subclause (i). S. Rep. 99-159, *supra*, at 10. The House Report expressly rejects this, stating that "a representative . . . need not be a formal or recognized collective bargaining agent, as long as it is a representative designated by the employees." H. Rep. 99-331, *supra*, at 20. *See* Pet. Br. at 22-23 & n.12. In formulating its regulations, the Labor Department determined that the House Report more accurately described the statute's meaning. *See* Pet. Br. 14-15; *infra* at 8-9 & n.5.

What is important here, however, is that both reports conflict with respondents' proffered "plain meaning," under which an employer may use individual agreements regardless of the existence of a representative—recognized or otherwise—as long as no agreement with a representative permitting compensatory time has yet been concluded.

spondents assert as the statute's "plain meaning," respondents' construction simply cannot be deemed to constitute the meaning unambiguously intended by Congress. *See INS v. Cardoza-Fonseca*, *supra*. Accordingly, the assertion of the "plain meaning" rule by respondents and their *amici* should be rejected.

B. Respondents' Arguments Regarding The Department of Labor's Regulation

As we have shown in our principal brief, the Department of Labor's governing regulation—which was promulgated pursuant to an express mandate of Congress and after full notice and comment procedures—is fully supportive of petitioners' position, clearly reasonable in light of the statute's language, history, and overall policy, and fully deserving of enforcement by this Court under every principle of statutory interpretation. *See* generally Pet. Br. 10-19.[4]

Respondents in essence acknowledge the fact that the unambiguous language of the regulation supports petitioners' position. *See* Resp. Br. 27 (noting that "at first glance the words of these regulations may seem to support

[4] As we noted in our initial brief, the explicit regulatory text endorses petitioners' position in the following ways:

First, the regulation makes clear that whenever employees "have a representative" they are "covered by subclause (i)," regardless of whether any agreement permitting compensatory time under that subclause has been successfully negotiated. *See* 29 C.F.R. § 553.23 (b)(1). The regulation thus conclusively rejects the interpretation of § 7(o)(2)(A) which respondents continue to urge to this Court.

Second, the regulation unequivocally states (a) that an employee shall be deemed to "have a representative"—and thus deemed to be "covered by subclause (i)"—whenever the employee "designate[s]" a representative; (b) that "[i]n the absence of a collective bargaining" system, "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees;" and (c) that a public employer may utilize "individual agreements" *only* "[w]here the employees of [the] public agency do not have a recognized or otherwise designated representative." 29 C.F.R. §§ 553.23(b)(1) & (c)(1).

Petitioners' position"); *id.* at 29 ("assume[s] that the regulations are consistent with the petitioners' position). Yet respondents then go on to attack the regulatory text as inconsistent with the statute's legislative history and with the Secretary's contemporaneous comments that accompanied the issuance of the regulation. *See* Resp. Br. 16-17, 23-25, & 28-29. *See also* NACo Br. 11-20. These critiques of the regulation have no merit.

1. Respondents' argument that the Labor Department's regulation conflicts with the statute's legislative history is part of respondents' broader argument that petitioners' interpretation of the statute conflicts with Congress' intent. The argument focuses on the difference between the House and Senate Reports. *See* note 3, supra. As noted in our initial brief, the House Report fully and unambiguously supports the regulation—and petitioners' claims in this case—in all of its aspects, while the Senate Report in one respect does not offer such support. *See* Pet. Br. 14-15, 22-23. The Secretary concluded that the House Report—and not the Senate Report—accurately reflected Congress' intent. *See* Pet. Br. 11-12, 14-15.

Arguing that the Secretary erred in this conclusion, respondents assert that it was the Senate bill—and not the House bill—that Congress enacted into law. Accordingly, respondents argue that the Senate Report must be "deemed to be more persuasive" than the House Report. Resp. Br. 16-18 (*citing Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (legislative report that accompanied language which finally passed is more persuasive)).

Put bluntly, the truth is precisely the opposite of what respondents assert. There is simply no doubt that the final statutory language at issue came from—and is almost identical to—*the House Bill*. *Compare* Amendments Act § 7(o)(2) *with* H. Rep. No. 331, *supra*, at 2-3 (*reprinted* at Pet. App. 37a-38a) (showing final language to be almost identical to language of H.R. 3530, § 2(o)(2)). Thus, while the bill that was finally reported by the Committee of Conference and enacted into law by Congress was—as respondents point out—identified under the number of the Senate Bill, S.1570, the language of the provision at issue here originated in the House Bill and had been explained in the House Report. *Compare* H. Conf. Rep. No. 357, 99th Cong., 1st Sess. 2-3 (1985) (*reprinted at* Pet. App. 142a-143a) *with* H. Rep. No. 331, *supra* at 2-3 (*reprinted* at Pet. App. 37a-38a).[5]

The conferees' choice on the statutory language to be adopted, in other words, fully supports the Labor Department's decision to follow the House Report.

2. Respondents and their *amici* argue that the clear language of the Labor Department's regulation conflicts with the explanation of this language by the Secretary. On this basis they urge that the regulation should be interpreted—despite its clear and contrary text—to allow public employers in States without full collective bargaining to do virtually as they wish. But, in fact, there is no conflict between the regulatory text and the Secretary's explanation of that text. And the regulatory text gives no support to respondents' position. Although we have fully explained this point in our initial brief, *see* Pet. Br. 29-32, given respondents' insistence, we will repeat and elaborate on this point here.

a. The explanatory language at issue appears in the preamble that accompanied the Department of Labor's regulation. *See* 52 Fed. Reg. 2014 (quoted and discussed at Pet. Br. 30). The context was a commentators' concern that the Department's regulatory language might be construed as imposing full collective bargaining relationships on public employers and employees, in spite of state

[5] In contrast, the Senate language that had accompanied the Senate Report—although similar to the final language—does clearly differ in language and structure from the final enactment. *Compare* Amendments Act, § 7(o)(2) *with* S. Rep. No. 99-159, *supra*, at 2-3 (*reprinted* at Pet. App. 102a-103a).

laws prohibiting such arrangements. *Id.* In response, the Department pointed out that, contrary to the commentator's premise, the language allowed for the use of a "memorandum of understanding, or other agreement . . . between the public agency and the representative of the employees where the employees have designated a representative" (*viz.*, the use of agreements outside the context of full collective bargaining). Individual agreements would be permitted the preamble stated, only "[w]here the employees do not have a representative." 52 Fed. Reg. 2014-15 (quoted and discussed at Pet.Br. 30-31).

The preamble then stated as follows:

> The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA § 7(o) shall be determined in accordance with State or local law and practices. [*Id.*]

The preamble then turned to another commentator's concern that the regulatory language might allow employers outside of formal collective bargaining relationships to escape the restrictions of § 7(o)(2)(A)(i). In response, the Department "clarif[ied] the fact that the representative of the employees need not be a formal or recognized collective bargaining agent" and emphasized that "collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative." 52 Fed. Reg. 2014-15 (quoted and discussed at Pet.Br. 30-31).

b. Respondents and their *amici* claim that the indented language from the preamble makes clear that it was the Department's intention to allow States that do not permit formal collective bargaining for public employees the option of prohibiting all dealings with employee representatives *and* implementing the compensatory time arrangements of the State's choosing. *See* Resp. Br. 28-29; Mo. Br. 7 n.3; NACo Br. 16.

For a variety of reasons, this is an entirely unnatural construction of the language in question: *first*, there is absolutely no support for it in the statutory text; *second*, the indented language appears immediately between two explicit preamble statements that, in the absence of collective bargaining, it is *the designation* of a representative by an employee that places the employee within § 7(o)(2)(A)(i); and, *third*, the indented language also appears immediately before an explicit preamble statement that designation of a representative by the employee is the relevant test *even if the employer does not recognize* the employee's representative. *See* 52 Fed. Reg. 2014-15.

There is, moreover, a far more natural interpretation of the general statement contained in the indented language. As we explained in our initial brief:

> The Department's statement that "the question of whether employees have a representative . . . shall be determined in accordance with State or local law and practice," fairly read, simply explains that state law may be relevant in determining when employees "have designated a representative." Thus, when state law creates a method for employee designations of representatives—*e.g.*, through a collective bargaining system based on exclusive representation—that system will be sufficient under § 7(o), and § 7(o) will not be construed in a manner that disrupts the state's designation process. [Pet. Br. 31-32.] [6]

---

[6] One of respondents' *amici* urge that the construction of the statute that the Department of Labor's regulation adopts "would be a prescription for chaos in public sector labor relations" in those States that prohibit exclusive representation, since public employers in such States might find themselves having to deal with different representatives for different employees. NACo Br. 17. Because the preamble language at issue—properly understood—gives States the option of structuring the process by which employees designate representatives in any reasonable manner that the State believes will avoid disorder or inefficiency, this concern has no merit. In any case, a public employer is always free to reject the option of seeking § 7(o)(2)(A) agreements and to adopt

c. Respondents' argument that the statutory and regulatory text at issue should be construed as not applying to those states, like Texas, that prohibit public-sector collective bargaining is premised on the notion that application of the regulatory understanding of § 7(o)(2)(A) to such states would displace their state prohibitions against collective bargaining. *See, e.g.*, Resp. Br. 22; NACo Br. 21. Nothing could be further from the truth.

First, nothing in petitioners'—or the Department of Labor's—interpretation of § 7(o)(2)(A) would ever require *any* public employer to negotiate with, to recognize, or in any way to acknowledge, any representatives of its employees. The entirety of our claim is that if a public employer fails to reach some sort of agreement with its employees' representatives, the employer will simply be bound by the normal Fair Labor Standard Act ("FLSA") overtime rules that bind private sector employers in our society, and that would have bound public sector employers if not for the passage of the Amendments Act. This grant to the States of an opportunity to exempt themselves from normal FLSA requirements can hardly be construed as "a requirement" that States abandon their policies of refraining from collective bargaining. *See* Pet. Br. 24-27.

Second, the text of the regulation relating to § 7(o)(2)(A) makes absolutely clear that collective bargaining in any normal sense of the term—*viz.*, a system involving exclusive representation, formal recognition, binding contracts, etc.—is *not* necessary to an agreement under subclause (i). *See* Pet. Br. 24-25. Rather, agreements of the most individualized, informal, nonbinding, and limited nature are fully sufficient to pass muster under that subclause. Indeed, as demonstrated at length in our initial brief, § 7(o)(2)(A)(i) was worded as it was in order to allow states which prohibit all but the most

---

the option of—like a private sector employer—paying normal overtime instead.

informal public sector employee representation arrangements to have the option of entering compensatory time agreements with their employees' representatives, and thereby exempt themselves from normal FLSA overtime requirements. *See* Pet. Br. 25.

d. Respondents and their *amici* respond with assertions that in some states, including Texas, state law would prohibit employers from entering agreements under § 7(o)(2)(A)(i) even if those agreements—as is the case—need be nothing more than the most informal and nonbinding arrangements between a public employer and an employee's representative. This assertion is made with no supporting authority.

First, respondents cite materials that would prohibit public employers in Texas from entering *binding contracts* with employee representatives. Resp. Br. 24. This ignores that § 7(o)(2)(A)(i) agreements need not be binding contracts under state law, nor are they made binding by virtue of the FLSA. The only FLSA consequence of an employer's renunciation or breach of a § 7(o)(2)(A)(i) agreement is that the employer is required to pay overtime pursuant to the normal FLSA rules. *See* Pet. Br. 28-29 (discussing Texas law in relation to Amendments Act scheme).

Second, Missouri, as an *amicus*, asserts that its laws prohibit *any* employer initiated discussions with public employee unions. Mo. Br. 13 n.5. This ignores that under § 7(o)(2)(A)(i) it is the *employee* who must initiate discussions by designating a representative for that purpose. *See* Pet. Br. 11-12.

Thus, neither respondents nor their *amici* have cited any state law that would prohibit the kinds of informal and nonbinding arrangements at issue here.[7]

---

[7] It is worth noting, however, that even if respondents and their *amici* had found some state law principle that would prohibit some public employer from entering into the informal and nonbinding

C. *Amici*'s "Plain Statement" Argument

Two of respondents' *amici*—but not respondents themselves—argue that this case should be decided under the "plain statement" rule of *Gregory v. Ashcroft*, —— U.S. ——, 59 L.W. 4714 (1991). *Gregory* provides that a statute will not be construed to bring certain traditional state functions under federal regulation, and thus "upset the usual constitutional balance of federal and state powers," unless Congress "make[s] its intention to do so unmistakably clear in the language of the statute." *Id.* at 4716-17. These *amici* argue that, because the Department of Labor's interpretation of § 7(o)(2)(A) is not "unmistakably clear in the language of the statute," the Department's interpretation must be rejected. *See* Mo. Br. 8-14; NACo Br. 20-24.

This argument—which has not been previously raised in this litigation—rests on a misreading of the *Gregory* rule. *Gregory* was precipitated by a controversy over the threshold question of federal coverage, *viz.*, over *whether* Congress intended to bring certain traditional state functions under federal regulation and thereby "upset the usual constitutional balance." For two reasons the *Gregory* rule and its rationale have no application here.

1. There is no controversy in this case concerning the issue of *whether* Congress intends federal law to control the compensatory time and overtime pay practices of respondents that are at issue. Congress clearly does so intend. Congress *unmistakably* brought these employment practices under federal regulation in 1974, when

---

arrangements described in subclause (i), this would still not merit altering the operation of the statute. The consequence would simply be—as we have noted—that such an employer would be required to pay its employees the same overtime compensation that any private sector employer would be obliged to pay. *See supra* at 12. This consequence would provide no reason for refusing to give effect to the reasonable statutory understanding contained in the Department of Labor's regulation.

the Legislature "extend[ed] FLSA coverage to virtually all state and local government employees." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985) (citing 88 Stat. 58, 60); *see also* 29 U.S.C. §§ 203(d), (e) & (x). And, in 1985, Congress left the coverage of the FLSA unchanged in all relevant respects, even as the Legislature changed the content of the relevant rules. *See* Pet. Br. 13 & n.6. Thus, the only issue here involves the precise content of the federal regulatory scheme, *not* the issue of federal coverage. *See generally* Pet. Br. 9 n.4 (describing federal labor standards, including § 7(o)(2)(A), that clearly govern a public employer's use of compensatory time off).

As just stated, *Gregory v. Ashcroft*, in contrast, involved a controversy over the threshold question of whether Congress intended to assert federal authority over traditional state practices that had *not* previously been subject to federal authority. Only in that context did the Court—or, indeed, could the Court—describe the issue as whether Congress intended, by the action in question, "to upset the usual constitutional balance of federal and state powers." 59 L.W. 4716. *Gregory's* requirement of extraordinary clarity only makes sense with respect to the congressional decision that represents such an extraordinary expansion of federal coverage. To place the same requirement of extraordinary clarity on Congress with respect to *all* legislative decisions affecting the States, even after Congress has unmistakably made the threshold decision regarding coverage, would be to obstruct the ability of Congress to formulate rational policy in an area in which the Legislative Branch determined that it is necessary and proper to act.

In essence, the *amici* who raise *Gregory* seek to transform the *Gregory* rule into one that decides every controversy regarding the meaning of a federal enactment that relates to the States in the States' favor. And, as these *amici* make clear, one of the consequences of this extreme

rule would be to all but eliminate Congress' right to utilize federal administrative agencies to elucidate its enactments. *See, e.g.*, Mo. Br. 9 (urging that any ambiguity in a statute should be resolved in favor of the State); NACO Br. 22-23 (urging that there be no deference to agencies under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) in cases involving the States). Given the myriad and complex areas where federal enactments unmistakably apply to state activities, such an approach would severely undermine the ability of the Federal Government to exercise its constitutionally delegated powers to deal with *national* problems in a manner that furthers the public interest.

2. Applying the *Gregory* rule to the instant case would be particularly inappropriate. The provision at issue here was part of a legislative compromise that was undertaken at the behest of the States, and that was designed *to lessen* the burdens placed on the States by prior legislation that had *unambiguously imposed substantially greater burdens*. *See* Pet. Br. 15-18 (describing history of Amendments Act).[8] Under such circumstances, to adopt a rule that would resolve every possible legislative ambiguity in favor of the States might ultimately frustrate the very process of conciliation between Congress and the States that is the linchpin of our Federal system in this area.

The Amendments Act represents the success of legislative efforts by state and local governments to obtain relief from far clearer and more certain—but far less flexible—statutory requirements. Relief was obtained through the process of reaching complex compromises with those representing other interests. If this Court creates

[8] *See also* Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later* (forthcoming 1993) (document lodged with Clerk of the Court by *amicus* National Association of Counties, *see* NACo Br. 27 n.24) (treating Amendments Act as legislation relieving States of burden rather than imposing burdens, *see* IV-3 through IV-6, IV-15 through IV-17).

a rule under which any possible ambiguities in such compromises will be judged victories for state and local governments, compromises will likely be far more difficult to reach in the future. Put simply, under such a rule, there will be every incentive for those other interests to insist on existing legislative language that binds the States to clear and unambiguous regulatory standards, even though those standards are more onerous to the States than more flexible and more accommodating—but less than "unmistakably clear"—alternatives. *Cf.* Easterbrook, *Forward: The Court and the Economic System*, 98 Harv. L. Rev. 4, 46-51 (1984) (when legislation is the result of compromises among divergent groups, rules of statutory construction must respect the limits regarding what each group obtained, which together represent the legislative judgment reached).

CONCLUSION

For the reasons in petitioners' initial brief and in this reply brief, the judgment below should be reversed.

Respectfully submitted,

MICHAEL T. LEIBIG
(Counsel of Record)
DANIEL G. ORFIELD
ZWERDLING, PAUL, LEIBIG,
KAHN, THOMPSON & DRIESEN
1025 Connecticut Ave., N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5340

Counsel for Lynwood Moreau and all other Petitioners

(6)

No. 92-1

In The

Supreme Court of the United States

October Term, 1992

LYNWOOD MOREAU, ET AL.,

Petitioners,

v.

JOHNNY KLEVENHAGEN, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE STATE OF MISSOURI AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

WILLIAM L. WEBSTER
Attorney General
BRUCE FARMER
Assistant Attorney General
State of Missouri
P. O. Box 899
Jefferson City, MO 65102

JACK L. CAMPBELL
(Counsel of Record)
WILLIAM E. QUIRK
W. TERRENCE KILROY
ADAM P. SACHS
SHUGHART THOMSON & KILROY
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105
(816) 421-3355

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

LEGISLATIVE HISTORY

ADMINISTRATIVE MATERIALS

MISCELLANEOUS

No. 92-1

In The

Supreme Court of the United States

October Term, 1992

LYNWOOD MOREAU, ET AL.,

Petitioners,

v.

JOHNNY KLEVENHAGEN, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE STATE OF MISSOURI AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The State of Missouri, by its Attorney General William L. Webster, submits this amicus curiae brief in support of respondents.

INTEREST OF THE AMICUS CURIAE

The Honorable William L. Webster, Attorney General for the State of Missouri, is currently involved in the defense of *Heaton v. Moore*, Case No. 91-0638-CV-W-2, an action pending in the United States District Court for the Western District of Missouri. Plaintiffs in *Heaton*, who are

employees of the Missouri Department of Corrections, allege that the defendant Missouri state officials violated Section 7(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(o) (1985), by failing to reach an agreement with employee representatives before providing compensatory time off in lieu of wages for overtime hours worked. The *Heaton* defendants have argued that they properly provided employees with compensatory time off because Missouri law precludes an agreement under subsection (i) of § 7(o)(2)(A), and because defendants have satisfied the individual agreement or understanding requirement under subsection (ii) of that section.

Because the facts of *Heaton v. Moore* closely mirror the facts in the present case,[1] and because the Court may find a comparison of the Missouri statutory scheme helpful in determining the scope and effect of its opinion in the present case, the State of Missouri submits this amicus curiae brief pursuant to Rule 37.5.

SUMMARY OF THE ARGUMENT

The statutory language of the Fair Labor Standards Act at issue in this case is unambiguous. It permits state

[1] In both cases, (1) the public employees had designated a representative, (2) state law prohibited the public agency from entering into a collective bargaining or similarly enforceable agreement with the representative, and (3) the public agency, without an agreement with the employees' representative, had established a pay system providing for compensatory time. *See Moreau v. Klevenhagen*, 956 F.2d 516, 519 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 51 (1992).

agencies to enter into agreements regarding compensatory time with individual employees when there is no agreement between the agency and the employees' designated representative. When the terms of the statute are unambiguous, there is no need to engage, as petitioners do, in an extensive analysis of the legislative intent behind the statute.

Even if, as petitioners themselves maintain, the statutory language is ambiguous in some respect, petitioners' argument still fails. The State of Texas, like the amicus State of Missouri, has determined as a matter of fundamental public policy that it will not enter into collective bargaining or other agreements with unions representing state employees. Under the "plain statement" rule applied in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), any intent by Congress to interfere in this area of sovereign authority cannot be ambiguous, but must be unmistakably plain.

ARGUMENT

I. THE LANGUAGE OF THE FAIR LABOR STANDARDS ACT UNAMBIGUOUSLY PROVIDES THAT, IN THE ABSENCE OF AN AGREEMENT BETWEEN A PUBLIC AGENCY AND A UNION REPRESENTING PUBLIC EMPLOYEES, THE PUBLIC AGENCY IS FREE TO REACH AGREEMENTS WITH INDIVIDUAL EMPLOYEES REGARDING COMPENSATORY TIME.

The issue in the present case is whether a state that has not reached an agreement with a union representing state employees may nevertheless reach agreements or

understandings regarding compensatory time with individual employees under subclause (ii) of § 7(o)(2)(A) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(o)(2)(A)(ii). The unambiguous language of the statute establishes that a state may reach such individual agreements.

The 1985 Amendments to the FLSA were passed in response to the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which made state and local government employers subject to the FLSA. Section 7(o) of the Act as amended offered these government employers the opportunity to become exempt from the normal FLSA requirement of paying cash for overtime. Section 7(o) provides in relevant part:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . .

29 U.S.C. § 207(o).

Public agencies thus have two methods of providing compensatory time in lieu of the usual FLSA requirement of paying cash for overtime. Under subclause (i) of § 7(o)(2)(A), they may enter into agreements with unions that represent state employees. Under subclause (ii) of that section, they may enter into individual agreements with employees "not covered by" subclause (i) of § 7(o)(2)(A). Contrary to petitioners' implication, the language of subclause (ii) does not permit individual agreements only when state employees are "not covered by" a *union*; the plain language instead says "not covered by *subclause (i)*." Because subclause (i) requires not only union representation, but also some *agreement* between the State agency and the union, the absence of such an agreement must mean that the union's employees are "not covered by subclause (i)." Subclause (ii) should accordingly be available to a State agency as a method of avoiding cash overtime whenever an agreement has not been reached between a State employer and a union.

The Fifth Circuit Court of Appeals adopted this analysis in its decision below. It correctly concluded that "the plain language of § 207(o)(2)(A) mandated an agreement between a public agency and an employee representative in order to subject an agency to subclause (i)." *Moreau v. Klevenhagen*, 956 F.2d 516, 519 (5th Cir. 1992). This holding

was in accord with the decisions of other Circuits, most notably the Eleventh Circuit in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990).

If, as seems apparent, the statutory language at issue is clear on its face, the legislative history and the enforcing regulations are largely irrelevant. "Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597, 606 (1986) and *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where, as here, a statute is unambiguous on its face, the Court will look to the legislative history only to confirm that there is no "clearly expressed legislative intent" to the contrary. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

In the present case there is no "clearly expressed legislative intent" that could possibly override the clear language of the statute. Although some support can be found in the legislative history for petitioners' position, that support is not as clear, or certainly as consistent, as petitioners would have it. Nearly every appellate decision interpreting the relevant legislative history and related Department of Labor regulations and commentary has concluded, to varying degrees, that this history fails to provide consistent guidance. *See Abbott v. City of Virginia Beach*, 879 F.2d 132, 135 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990) (legislative history contradictory; administrative commentary confusing); *Dillard v. Harris*, 855 F.2d at 1553-54 (legislative history revealed "no single

intent," "no stated consensus," and "no clear answer to what effect the presence or absence of a 'representative' would have on whether employees are 'not covered by' § 207(o)(2)(A)(i)");[2] *Abbott*, 879 F.2d at 135-36 (noting conflict between the regulations implementing the FLSA Amendments and the accompanying "Discussion of Major Comments" issued by the Secretary of Labor, *see* Application of the Fair Labor Standards Act to Employees of State and Local Government, 52 Fed. Reg. 2012, 2014-15 (Dep't Labor 1987).[3]

Even cases and circuits on which petitioners rely suggest that the legislative history is far from conclusive. In *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814, 819-820 (10th Cir. 1989), the Tenth Circuit observed that the Department of Labor regulations do not square with the Senate Committee Report on the issue of

---

[2] The *Dillard* court noted that the Senate Committee Report referred to "recognized representatives," while the House Report referred to "representatives designated by the employees." S. Rep. No. 159, 99th Cong., 1st Sess. 10-11 (1985); H.R. Rep. No. 331, 99th Cong., 1st Sess. 17-18 (1985). The House and Senate Committee Reports contain no explanation or resolution of this difference, nor does the report of the joint conference committee. *Dillard*, 855 F.2d at 1554.

[3] While the regulations provide that "in the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees," 29 C.F.R. § 553-23(b)(1) (1987), the Secretary of Labor's comments state that "it is the Department's intention that the question of whether employees have a representative for purposes of FLSA § [207(o)] shall be determined in accordance with state and local law practices." *See Wilson v. City of Charlotte*, 964 F.2d 1391, 1395-96 (4th Cir. 1992).

whether employees having a designated representative are deemed to be "represented," even if the employer failed to recognize the representative. In *SNEA v. Bryan*, 916 F.2d 1384, 1388 (9th Cir. 1990), the Ninth Circuit, which authored two opinions relied on by petitioners, agreed with the Fourth Circuit in *Abbott* that "the House and Senate Reports offer different views of the meaning of § 207(o)."

Because the language of the FLSA unambiguously permits it, and because the legislative and administrative histories of the Act provide no clearly expressed contrary intent, respondents here should be free to reach agreements with individual state employees regarding the use of compensatory time under subclause (ii) of FLSA § 7(o)(2)(A).

II. EVEN IF, AS PETITIONERS CONTEND, THE RELEVANT LANGUAGE OF THE FAIR LABOR STANDARDS ACT IS AMBIGUOUS IN SOME RESPECT, THE STATUTE MUST BE READ TO ALLOW A STATE AGENCY TO REACH AGREEMENTS WITH INDIVIDUAL EMPLOYEES ON COMPENSATORY TIME UNDER THE "PLAIN STATEMENT" RULE OF STATUTORY INTERPRETATION WHERE, AS HERE, STATE LAW FORBIDS AN AGREEMENT WITH THE EMPLOYEES' UNION.

Even if the language of section 7(o)(2) is, as petitioners contend, ambiguous, petitioners are not helped. Under the plain statement rule applied in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), any such ambiguity would be fatal to petitioners' reading of the statute.

Petitioners concede that section 7(o)(2)(A) is ambiguous:

> [E]xactly which classes of employees are "covered by subclause (i)" and which are "not covered" is not explicitly stated in the statutory text. As the Tenth Circuit explained, "it is unclear whether ["employees not covered by subclause (i)"] means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. *Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-17 (10th Cir. 1989). *Given this ambiguity,* and given Congress' action in charging the Department of Labor with the authority to administer the FLSA, the proper starting point in clarifying the meaning of § 7(o)(2)(A) is the Department's interpretation of that provision.

Petitioners' Brief at 10 (emphasis added).

Contrary to petitioners' premise, if the statutory language here is ambiguous, it is the *end*, not the beginning, of the inquiry. Petitioners' reading of the statute would *require* respondents, Missouri, and other similarly situated States to reach agreements with state employees' unions in order to use compensatory time, even though these States, like Texas in the instant case, *forbid* such agreements as a matter of state policy.[4] Because

[4] Texas law "prohibits any political subdivision from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act." *Moreau*, 956 F.2d at 519. Because the political subdivision did not adopt the Employee Relations Act in the present case, the county had no authority to

petitioners' reading of the statute would interfere with fundamental state policy, that reading can stand only if the language of the statute is "unmistakably clear." *Gregory v. Ashcroft*, 111 S. Ct. at 2401 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Here, by petitioners' own admission, the language is ambiguous rather than clear.

The Court in *Gregory* recognized that under the Supremacy Clause, U.S. Const. art. VI, "Congress may impose its will on the States" as long as it acts under powers granted by the Constitution. 111 S. Ct. at 2400. Because of the "extraordinary nature" of this power, however, the Court assumed that Congress would not exercise it lightly. *Id.* Thus, when a congressional enactment would interfere with fundamental decisions of states acting as sovereigns, and thereby "upset the usual constitutional balance of federal and state powers," the intent of Congress to interfere must be plain. As the Court noted

---

bargain with the union. *Id.* Although Missouri law allows State agencies to recognize a union as the exclusive bargaining representative of their employees, it specifically bars the State from negotiating enforceable collective bargaining agreements. Mo. Rev. Stat. § 105.500-.520 (1983). Missouri specifically limits the extent of discussions over wages and working conditions, precludes public employers from formally adopting, modifying or rejecting proposals from a labor organization, and allows a state public employer simply to "meet, confer and discuss" only those proposals that first come from a recognized labor organization. *Id.* § 105.520. Thus Missouri, like Texas here, prohibits its agencies from reaching any binding "agreement" with any labor organization within the meaning of subsection (i) of § 7(o)(2)(A). *See Null v. City of Grandview*, 669 S.W.2d 78, 80 (Mo. Ct. App. 1984).

in *Gregory*, quoting its earlier decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989):

> [I]f Congress intends to alter the "usual constitutional balance between the States and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

111 S. Ct. at 2401. The *Gregory* Court then stated:

> This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Id.

Although *Atascadero* and *Will* were Eleventh Amendment cases, the Court in *Gregory* extended the plain statement rule to areas protected by the Tenth Amendment. The Court expressly recognized the authority of the State of Missouri to set a mandatory retirement age for its judges:

> It is an authority that lies at "the heart of representative government." It is a power reserved to the States under the Tenth Amendment and

> guaranteed them by that provision of the Constitution under which the United States guarantees to every State in this Union a Republican Form of Government. U.S. Const. art. IV, § 4.

111 S. Ct. at 2402 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). The Court in *Gregory* accordingly refused to apply the Age Discrimination in Employment Act to invalidate Missouri's chosen retirement age for its judges because the Act contained no plain statement of congressional intent to do so:

> In the face of such ambiguity, we will not attribute to Congress an intent to intrude on the State governmental functions regardless of whether Congress acted pursuant to its commerce clause powers or § 5 of the Fourteenth Amendment.

111 S. Ct. at 2395.

The present case is no different. A state's determination of how, and on what terms, it will engage in collective bargaining or otherwise reach agreements with unions representing its employees is at the very heart of a state's sovereign authority.[5] It is no answer to say, as

---

[5] Petitioners suggest that Texas may not have a strong public policy against all dealings between public employers and unions. They argue that while Texas public employers are admittedly precluded from entering into collective bargaining agreements with unions, under Texas law such employers may still enter into other "less formal" and "less binding" relationships with unions as representatives of their employees. Petitioners' Brief at 26. Even if this were an accurate statement of Texas law, it cannot condone any congressional interference in the relationship between Texas and its public employees absent the clearest statement of such intent in the FLSA. This is even more true with respect to states such as Missouri, which do not even allow public employers to initiate *discussions* regarding wages, hours, and working conditions with employee representatives. In Missouri, for example, public employers may only "meet, confer and discuss" union proposals, and then only if those proposals are first initiated and presented by the union. Mo. Rev. Stat. § 105.520 (1983).

petitioners do, Petitioners' Brief at 32, that states simply have a *choice* under the FLSA "either to pay overtime compensation to represented employees or to reach an agreement with the employees' representative authorizing the use of compensatory time." States cannot be so easily deprived of their Tenth Amendment right to regulate their own governmental functions.[6] Because a state's handling of its relations with its own public employees is uniquely within its sovereign power, Congress must make unmistakably plain any intent to regulate a state's conduct in this area. Congress has failed to do this in the FLSA.

Petitioners' reading of section 7(o)(À)(2) of the Act would allow Congress to regulate in an area traditionally

---

[6] This exact issue was addressed in *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (10th Cir. 1989), a case on which petitioners place principal reliance on another point. In rejecting the plaintiff's argument that it need not reach the Tenth Amendment question, the *West Adams* court stated:

> If the decision to engage in collective bargaining is protected from federal influence by the tenth amendment, the [defendant] is correct that it should be free to choose its own course regarding collective bargaining, without Congress enticing it down a certain path with the carrot of compensatory time.

877 F.2d at 820 n.7

reserved to the states under our federal system. Respondents' reading does not. Because petitioners concede that section 7(o)(A)(2) is ambiguous, and merely argue that their interpretation is the more plausible one, it is self-evident that Congress has not expressed its intent to regulate the states' dealings with their own employees' unions in the "unmistakably clear" language required by *Gregory v. Ashcroft*.

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

DATED: January 8, 1993

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
BRUCE FARMER
Assistant Attorney General
State of Missouri
P. O. Box 899
Jefferson City, MO 65102

JACK L. CAMPBELL
(Counsel of Record)
WILLIAM E. QUIRK
W. TERRENCE KILROY
ADAM P. SACHS
SHUGHART THOMSON & KILROY
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105
(816) 421-3355

(7)

No. 92 - 1

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LYNWOOD MOREAU, et al.,

PETITIONERS,

VS.

JOHNNY KLEVENHAGEN, et al.,

RESPONDENTS.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

SUSAN M. HORTON
COUNSEL OF RECORD
GENERAL COUNSEL
TEXAS MUNICIPAL LEAGUE
211 EAST 7TH, SUITE 1020
AUSTIN, TEXAS 78701-3283
(512) 478-6601

ATTORNEY FOR AMICI CURIAE

16 pp

QUESTION PRESENTED

The Fair Labor Standards Act as amended provides that public employers may substitute compensatory time at the rate of not less than 1 1/2 hour for each hour of overtime worked in lieu of overtime pay in cash, provided that the compensatory time is pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement of understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A)].

Section 207(o) further specifies that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. Section 207(o)].

The question presented here is whether a public agency may reach an agreement regarding compensatory time with individual employees under subclause (ii) when the agency is barred by state law from reaching an agreement with a union representative under subclause (i).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

No. 92 - 1

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LYNWOOD MOREAU, et al.,

PETITIONERS,

VS.

JOHNNY KLEVENHAGEN, et al.,

RESPONDENTS.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The Texas Municipal League is a nonprofit association of over 960 Texas municipalities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas municipalities. Amici curiae have a vital interest in this case because the decision of this Honorable Court has the potential for affecting the compensatory time structure currently in use in literally thousands of state and local governments throughout the State of Texas and the United States.

Amici Curiae respectfully submit this brief in support of the Respondents.

Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief amicus curiae. The parties' written consent documents have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Amici curiae contend that in light of the plain language of Section 207(o), the relevant federal circuit courts of appeal that have construed that language of Section 207, and

Texas' prohibition against public employers' recognition of labor organizations, the Fifth Circuit Court of Appeals' decision should be affirmed.

ARGUMENT

Section 207(o) of the Fair Labor Standards Act provides, in pertinent part:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only -
>
> (A) pursuant to -
>
> (i) applicable provision of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement of understanding arrived at between the employer and employee before the performance of the work; ...

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii).

29 U.S.C. Section 207(o) (Supp. I 1992).

The issue in this case is whether a public agency may reach an agreement regarding compensatory time with individual employees under subclause (ii) when the agency is prohibited by state law from reaching an agreement with a union representative under subclause (i).

In addition to the Fifth Circuit's decision in this case, the Fourth, Tenth, and Eleventh Circuits have construed the language of Section 207(o). The Tenth Circuit opinion, however, is not instructive in this case because the Tenth Circuit case did not involve a state in which state law

prohibits a public employer from bargaining with an employee representative.

I. Federal Case Law

A. The Fourth Circuit

In *Abbott v. City of Virginia Beach*, a police officers association and 126 police officers in the Virginia Beach Police Department challenged the Department's compensatory time policy, alleging it violated the Fair Labor Standards Act. *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 854 (1990). The Department policy was to allow each officer to choose whether to receive his overtime compensation in money or compensatory time off or any combination thereof. The police officers claimed that this policy violated the FLSA, Section 207(o) because the Department refused to negotiate an agreement with the officers' designated FLSA representative, and promulgated the policy unilaterally. The police officers argued that the lower court had erred in interpreting the term "representative," and that any designee of the employees is a representative, whether recognized or not, and that compensatory time cannot be substituted with cash for overtime unless an agreement is reached with the representative. The police officers also argued that the employer could not reach individual agreements with employees who have made the designation to have a representative, such that the employee must be

compensated with cash for overtime in absence of an agreement.

In analyzing the case, the Fourth Circuit recognized that Virginia law prohibited the Department from collectively bargaining with representatives of its employees. The issue, in the words of the Fourth Circuit, was

> whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory leave in lieu of money for overtime where state law prohibits the employer from entering into agreements with employee representatives.

Abbott v. City of Virginia Beach, 879 F.2d 132, at 135. Citing the Secretary of Labor's expressed intent not to preempt state law and the House Report's statement that the purpose of section 207(o) was "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees," the Fourth Circuit held that "public employers may enter into *individual* agreements with its employees where state law prohibits agreements with employee representatives." *Abbott v. City of Virginia Beach*, 879 F.2d 132, at 136-137. (Emphasis added).

In *Wilson v. City of Charlotte*, the union member fire fighters of the Charlotte Fire Department challenged the Departments' policy of providing the fire fighters with compensatory time instead of cash payment for overtime hours worked. *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992). The Union argued that the Department's policy violated Section 207(o) of the Fair Labor Standards Act because the Department could not provide compensatory time for overtime worked without first reaching an agreement with the representative of the fire fighters. Without an agreement, the Union contended that the Department was required to pay cash for all overtime worked. The Department did not bargain with the union because North Carolina law prohibits contracts between governmental entities and labor unions.

In *Wilson*, the Fourth Circuit held that the Department was under no duty to reach an agreement with the union because the Department was prevented by state law from recognizing the union as the representative of the employees for purposes of Section 207(o) of the Fair Labor Standards Act. Thus, the court held that subclause (i) was not applicable. The Fourth Circuit found subclause (ii) to be applicable in determining whether the Department could substitute compensatory leave in lieu of cash for overtime worked. The court held that there was an

agreement under subclause (ii) because the employees were hired prior to April 15, 1986, and the practice in place on April 15, 1986 comprises the agreement between the employer and the employes.

B. The Eleventh Circuit

In *Dillard v. Harris*, the employees of a state hospital brought an action contending that the Georgia state hospitals violated the Fair Labor Standards Act by adopting a policy of providing compensatory leave in lieu of overtime pay without an agreement with the employees' representative. *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990). The Eleventh Circuit Court of Appeals indicated that the "critical fact" in the case was that Georgia law prohibited the employer from entering into an agreement with the representative of the employees. *Dillard v. Harris*, 885 F.2d 1549, at 1551. The Court found the Section 207(o) to be unambiguous on its face, and stated:

> it appears clear that the prerequisite for employees being "covered under subclause (i)" is an agreement or understanding between the employer and the employees' representative. Since the employees here had no agreement or understanding under subclause (i), they were not "covered" by it and thus were covered by subclause (ii).

Dillard v. Harris, 885 F.2d 1549, at 1552-53.

The court went on to hold, because the employees have no representative able to bargain over compensatory time, that

> the plaintiff employees were *not* covered by subclause (i) of section 207(o)(2)(A), and as a result *were* covered by subclause (ii). Under section 207(o)(2)(B), the practice in effect on April 15, 1986 constituted an agreement with respect to compensatory time, absent any contrary agreement between an employee and the state employer. Under that practice, the State's use of compensatory time was proper. (Emphasis in original).

Dillard v. Harris, 885 F.2d 1549, at 1556.

D. The Tenth Circuit

In *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, the Tenth Circuit Court of Appeals was asked to interpret Section 207(o)(i) and (ii) of the Fair Labor Standards Act. *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (10th Cir. 1989). Amici curiae contend, however, that the *West Adams* case is not relevant because of the factual differences between the case at bar and the *West Adams* Case.

The fatal difference is that the *West Adams* case did not involve any state law that precludes a public agency from entering into agreements with representatives of employees of that public agency. This factual difference is key to the question presented in the case at bar. Therefore, the *West Adams* case is distinguishable and provides no authority for the Petitioner's contentions in this case.

II. Texas Law

Article 5154c prohibits any political subdivision of the State of Texas from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted, through an election, the Fire and Police Employee Relations Act. TEX. REV. CIV. STAT. ANN., Art. 5154c (Vernon 1987); TEX. REV. CIV. STAT. ANN., Art. 5154c-1 (Vernon 1987). Harris County has not adopted the Fire and Police Employee Relations Act. Therefore, Harris County is prohibited by Texas law from bargaining with the union on the issue of compensatory time or any other issue.

III. The Case at Bar

In the case at bar, the facts are clear. The employees of the Sheriff's Department designated a representative for purposes of Section 207(o) of the Fair Labor Standards Act. Texas law prohibits Harris County from entering into

agreements with labor organizations because the Fire and Police Employee Relations Act has not been adopted in Harris County. The labor organization cannot, therefore, be a representative for purposes of the Fair Labor Standards Act, and therefore there cannot be an agreement entered pursuant to Section 207(o)(2)(A)(i). Harris County had established a compensatory leave system because of the practice in place on April 15, 1986, and the agreements entered into individually with employees hired after April 15, 1986. Thus, the compensatory time system provided for by Harris County complies with Section 207(o) of the Fair Labor Standards Act.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

/S/ Susan M. Horton
SUSAN M. HORTON
COUNSEL OF RECORD
GENERAL COUNSEL
TEXAS MUNICIPAL LEAGUE
211 EAST 7TH, SUITE 1020
AUSTIN, TEXAS 78701-3283
(512) 478-6601

ATTORNEY FOR AMICI CURIAE

(9)

No. 92-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHARLES J. COOPER
WILLIAM L. MCGRATH
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under section 207(o) of the Fair Labor Standards Act, a public employer is required to reach an agreement with a labor organization to provide compensatory time when state law prohibits collective bargaining.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-1

LYNWOOD MOREAU, *et al.*,
Petitioners,
v.
JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a direct and compelling interest in this case as the Court's decision will have a substantial impact on the ability of state and

local governments to provide essential services to their citizens.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court held that Congress could constitutionally extend the wage and hour provisions of the Fair Labor Standards Act ("FLSA") to state and local government employers. In response to *Garcia*, Congress enacted section 207(o) of the FLSA, 29 U.S.C. § 207(o). Section 207(o) authorizes public employers to compensate employees for overtime work with compensatory time off in lieu of cash pursuant to an agreement either with the employees' representatives or with individual employees. Petitioners contend that a public employer may only provide compensatory time to employees who have designated a "representative" pursuant to an agreement with that representative, even in States that do not allow public sector collective bargaining. Because this issue is of utmost importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is section 207(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(o). Added to the FLSA in 1985 to alleviate the financial impact on public employers of this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985),[2] section 207(o) authorizes public employers,

[1] In accordance with Rule 37 of the Rules of this Court, the parties' letters of consent have been filed with the Clerk of the Court.

[2] Both the House and Senate committees responsible for section 207(o) "recognize[d] that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 7—[were] a matter of grave concern to many states and localities." S. Rep. 99-159, 99th Cong., 1st Sess. 8 (1985); H.R. Rep. 99-331, 99th Cong., 1st Sess. 18 (1985); *see also* S. Rep. 99-159 at 16; H.R. Rep. 99-331 at 9 (quoting Congressional Budget Office estimate that *Garcia* "would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide").

pursuant to agreements with their employees, to provide "compensatory time"—paid time off—in lieu of cash for overtime work. The compensatory time agreements must be between the public employer and either the individual employees or their representatives.

Before the enactment of section 207(o), the FLSA flatly prohibited employers from providing compensatory time for overtime work. 29 U.S.C. § 207(a) (employers must pay employees one and one-half times normal rate for overtime). In addition to the fiscal concerns raised by many state and local government officials, Congress also recognized that "[m]any municipal employees both enjoy 'comp-time' and need it to enable them to better perform their jobs." H.R. Rep. 99-331 at 17.[3] Section 207(o) was thus intended both to provide relief to public employers and to protect public employees.

Respondent Harris County, Texas, has an individual employment agreement with each of its deputy sheriffs pursuant to which the deputies receive one and one-half hours of compensatory time off for each hour of overtime work. Petitioners, 113 deputy sheriffs employed by Harris County, seek back overtime pay as of the date they designated the Harris County Deputy Sheriffs' Union as their "representative" for the purpose of negotiating a new agreement governing compensatory time.

[3] At the same time that it authorized employers to award compensatory time, however, Congress did not intend to "retreat[] from the principles" that motivated it originally to extend the FLSA to public employers. S. Rep. 99-159 at 7; H.R. Rep. 99-331 at 17. Accordingly, compensatory time must be awarded "at a rate not less than one and one-half hours" for each hour of overtime, § 207(o)(1); employers must pay employees for additional overtime in cash once they accrue compensatory time in excess of a statutory limit, § 207(o)(3)(A); and employees must be compensated in cash for unused compensatory time upon termination, § 207(o)(4).

Simply designating a "representative," petitioners contend, both nullified their existing compensatory time agreements with Harris County, and obliged the County to pay cash (at time and a half) for overtime work until such time as the County and the "representative" worked out some other compensatory time agreement, if ever, despite the fact that Texas law prohibits Harris County from engaging in collective bargaining.

Thus, under petitioners' interpretation of section 207(o), Congress intended to put public employers in Texas, and other States that prohibit public sector collective bargaining, to the following choice: either violate (or repeal) the state law prohibition on collective bargaining with public employees, or pay the employees time and a half in cash for each hour of overtime worked. But Congress had a simpler and more modest purpose in mind when it enacted section 207(o): to extend certain minimum standards relating to overtime compensation to public employees, while preserving to the greatest extent possible compensatory time arrangements that have arisen under varying state laws governing labor relations in public employment. In other words, Congress intended to authorize public employers to continue their pre-*Garcia* practice of providing compensatory time (subject to certain minimum standards), whether pursuant to some form of collective bargaining agreement, in those States that permit collective bargaining by public agencies, or pursuant to individual employment contracts, in those States, like Texas, that do not.

Congress carefully crafted plain and unambiguous language in section 207(o) to effectuate its purpose. Compensatory time may be provided pursuant to either an agreement "between the public agency and representatives of [its] employees" or "an agreement or understanding arrived at between the employer and employee before the performance of the work." In this case, there is no agreement between Harris County and a representative of petitioners because Texas law prohibits such agreements.[4] But Harris County and its deputy sheriffs have entered into agreements "between the employer and the employee before the performance of the work," and those employment contracts provide for the payment of compensatory time. Accordingly, Harris County's use of compensatory time is plainly authorized by the language of section 207(o).

Overcoming section 207(o)'s plain language elicits no small amount of ingenuity on petitioners' part. Citing section 207(o)'s "open texture," petitioners assert that the language of the provision is ambiguous. Petitioners thereupon invoke the regulations promulgated under section 207(o) by the Department of Labor. These regulations provide that a representative designated by the employees "need not be a formal or recognized bargaining agent," and that "[w]here employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency . . . ." 29 C.F.R. § 553.23(b)(1). According to petitioners, the regulations make clear that the *designation* of a representative by a public employee obligates the public employer either to negotiate a new compensatory time agreement with the representative, even if doing so is unlawful under state law, or to pay cash for overtime work.

Petitioners' analysis fails at both steps. First, petitioners' asserted "ambiguity" does not exist. Second, even if their argument could survive a reading of the statute's dispositive language, the regulations on which they rely yield an equally fatal result. The critical issue under

---

[4] *See* Tex. Rev. Civ. Stat. Ann. art. 5154c(1) and (2) (Vernon 1987). The voters of Harris County have not adopted The Fire and Police Employee Relations Act, *see* Tex. Rev. Civ. Stat. Ann. art. 5154c-1 (Vernon 1987), which would permit Harris County to enter into collective bargaining agreements with its firefighting and law enforcement employees. Pet. App. 4a.

the regulations is not whether the employees have a "recognized," "formal," or merely "designated" representative—it is whether they have a "representative" at all. And this question, as the Labor Department has made clear, is to be determined by state law. In this case it is undisputed that Texas law precludes petitioners from designating a representative with authority to negotiate and enter a compensatory time agreement.[4] Thus, the regulations, correctly understood, are in harmony with the language of section 207(o) and with Congress' purpose in enacting it.

Beyond these points, petitioners' interpretation of section 207(o) would render the provision authorizing compensatory time agreements between the public employer and individual employees virtually meaningless. Moreover, empowering each public employee to designate his own representative without regard to state law would force public employers to negotiate as many separate compensatory time agreements as there are representatives designated by individual employees (or groups thereof). Finally, even if section 207(o) were ambiguous and petitioners' proposed construction of it otherwise plausible, that construction violates the principle that federal courts will not interpret a statute to intrude upon an area of traditional state governance, such as state and local employment relations, absent a plain statement in the statute that Congress intended such a result. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 207(o) UNAMBIGUOUSLY AUTHORIZES RESPONDENTS TO PROVIDE COMPENSATORY TIME PURSUANT TO AGREEMENTS WITH INDIVIDUAL EMPLOYEES.

Statutory construction begins, of course, with a "strong presumption that Congress expresses itself through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Sullivan v. Everhart*, 494 U.S. 83 (1990). The language and structure of section 207(o), set out in the margin, unambiguously authorize respondents to provide compensatory time pursuant to agreements with individual deputies.[5]

---

[5] In relevant part, Section 207(o) provides:

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between

Under section 207(o)(2)(A), a public employer may provide compensatory time in lieu of cash as long as it is provided according to either of two kinds of agreements. Subclause (i) provides that a public employer may provide compensatory time pursuant to applicable provisions of an "agreement between the public agency and representatives of [its] employees," and the agreement may be "a collective bargaining agreement, memorandum of understanding, or any other agreement." 29 U.S.C. § 207(o)(2)(A)(i). Following the disjunctive "or," subclause (ii) provides that "in the case of employees not covered by subclause (i)," an employer may award compensatory time pursuant to applicable provisions of an agreement or understanding between "the employer and employee before the performance of the work." 29 U.S.C. § 207(o)(2)(A)(ii). With respect to employees hired before April 15, 1986, the regular compensatory time practice in effect as of that date constitutes an agreement under subclause (ii). 29 U.S.C. § 207(o)(2)(B).

The application of the statutory language to this case is straightforward. Harris County has no compensatory

---

the employer and employees before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed in paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection . . . .

29 U.S.C. § 207(o)(1)-(2). The FLSA elsewhere provides that "[a]ny employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages." *Id.* § 216(b).

time agreement with a representative of its deputies, so the deputies are "not covered by subclause (i)." But as the court below held, the County's compensatory time policy in effect as of April 15, 1986, constitutes an agreement between the County and the deputies hired prior to that date, and each deputy hired after that date signed an individual compensation form agreeing to that policy. Pet. App. 6a. Accordingly, the County may, under subclause (ii), provide compensatory time pursuant to those agreements.[6]

Petitioners, however, claim to be confused by the language of section 207(o)(2), arguing that "exactly which classes of employees are 'covered by subclause (i)' and which are 'not covered' is not explicitly stated in the statutory text." Brief for Petitioners ("Pet. Br.") at 10. In support of this bald assertion of ambiguity petitioners offer no more than an equally bald assertion of ambiguity from the Tenth Circuit:

> We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative.

Id. at 20-21 (quoting *Local 2203 v. West Adams Cty. Fire Dist.*, 877 F.2d 814, 816-17 (10th Cir. 1989)). Neither petitioners nor the Tenth Circuit identify the specific "wording of subclause (i)" that gives rise to their alleged confusion. Nor do they explain how that wording can reasonably be read to apply only to "employees who

---

[6] *See also Dillard v. Harris*, 885 F.2d 1549, 1552-53 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990) (following precisely this plain language analysis); *Wilson v. City of Charlotte*, 964 F.2d 1391, 1394-95 (4th Cir. 1992) (*en banc*) (same); *id.* at 1396 (Luttig, J., concurring in part and concurring in the judgment in part) (same).

do not have a representative." They do not explain it because they cannot. The words of the statute simply do not yield the alternative reading that petitioners and the Tenth Circuit claim to see. In this regard, we cannot improve on the concise exegesis supplied by Judge Luttig in *Wilson*:

> The statute . . . is not at all ambiguous. The reference in subsection (2)(A)(ii) to "employees not covered by subclause (i)" can only be to employees who are not subjects of an agreement between their agency and their representative. *It cannot grammatically (and does not logically) refer to employees who are unrepresented because the compound objects of the prepositional phrase "pursuant to" in subsection (i) are the forms of agreements enumerated therein.* The subsection does not denominate a class of represented employees; it identifies certain agreements (in addition to those in subsection (ii)) that will satisfy the requirement of subsection (2)(A) that compensatory time be provided pursuant to an agreement.

964 F.2d at 1397 (Luttig, J., concurring in part and concurring in the judgment in part) (citations omitted) (emphasis added).[7] Thus, the plain language of the statute unambiguously authorizes Harris County to provide compensatory time pursuant to agreements with individual deputies.

[7] *See also Dillard*, 885 F.2d at 1552-53 ("It appears clear that the prerequisite for employees being 'covered under subclause (i)' is an agreement or understanding between the employer and the employees' representative. Since the employees here had no agreement or understanding under subclause (i), they were not 'covered' by it and thus were governed by subclause (ii).").

II. THE LEGISLATIVE AND REGULATORY HISTORY OF SECTION 207(o) SUPPORTS THE CONCLUSION THAT RESPONDENTS MAY PROVIDE COMPENSATORY TIME PURSUANT TO AGREEMENTS WITH INDIVIDUAL EMPLOYEES.

In the next step of their argument, petitioners rely upon the asserted ambiguity in the statute as a springboard to the Department of Labor's compensatory time regulations and to the rule of judicial deference to agency interpretations articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The regulation, however, is no more helpful to petitioners' cause than the statutory language itself.

In relevant part, the regulation provides:

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b)(1). According to petitioners, this regulation makes clear "beyond a doubt" that at the moment they designated a compensatory time representative, Harris County was "required either to pay [them] overtime pay under the FLSA's normal rules or to reach and abide by a compensatory time agreement with that representative." Pet. Br. at 11-12. Petitioners' position fails because it ignores the critical role that state public sector bargaining laws and practices play in the proper implementation of section 207(o).[8]

[8] *See* Pet. Br. at 32 ("Plaintiffs' position on the construction of the statute is simple: § 7(o)(2)(A)(i) governs all cases where an employee has designated a representative. *It does not matter*

Indeed, a careful analysis of the statute's legislative and regulatory history demonstrates that in extending certain minimum overtime compensation protections to public employees, Congress did not intend to otherwise disturb existing compensatory time agreements and the various state laws and practices governing public employment that gave rise to those agreements. This congressional concern for preserving state public employment relations law explains the distinction between subclauses (i) and (ii): in States that either permit or require public employers to bargain collectively with their employees, compensatory time may only be provided pursuant to an agreement with the employees' representative, while in States (like Texas) that prohibit public sector bargaining, the employer may provide compensatory time pursuant to agreements with individual employees.

The National Labor Relations Act ("NLRA"), which governs collective bargaining in the private sector, does not apply to public employers. *See* NLRA § 2(2), 29 U.S.C. § 152(2) (1988). Accordingly, States have developed by statute, by judicial decision, or through practice, a wide variety of policies relating to public sector labor relations.[9] Though diverse, these state arrangements gen-

---

whether the representative would be prohibited, under state law, from engaging in full collective bargaining, from entering binding contracts, or from otherwise engaging in representation activities beyond the most informal arrangements.") (emphasis added); *see also id.* at 24, 28-29.

[9] This discussion draws mainly upon three sources. The most comprehensive discussion of state laws and practices in effect at the time section 207(o) was enacted is R. Kearney, *Labor Relations in the Public Sector*, 53-74 (1984). An excellent summary is provided in Todd D. Steenson, Note, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity*, 75 Minn. L. Rev. 1807, 1817-20 (1991) [hereinafter Note, 75 Minn. L. Rev.]. *See also Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1676-82 (1984).

erally fall into one of three categories: (1) formal collective bargaining procedures modeled on the NLRA; (2) bargaining and contracting practices which, while not formal collective bargaining, are nonetheless binding on the public employer; and (3) outright prohibitions on public sector collective bargaining.[10]

Both the House and the Senate Committee Reports accompanying section 207(o) clearly acknowledge these varying public employment bargaining arrangements and express the Committees' intention not to disturb them. The House Report put it as follows:

> The Committee is also aware that many state and local government employers and their employees have agreed to voluntary arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of formal collective bargaining—[are] mutually satisfactory solutions that are both fiscally and socially responsible. *To the extent practicable, the bill accommodates such preexisting arrangements.* In addition, the bill offers employees and their employers the opportunity to voluntarily agree to the acceptance of compensatory time off at a premium rate in lieu of pay for overtime.

H.R. Rep. 99-331, 99th Cong., 1st Sess. 18 (1985) (emphasis added).[11] Congress thus recognized, approved, and intended to accommodate the various public sector compensatory time arrangements that existed when section 207(o) was enacted, and to authorize their continued use

---

[10] Included in this category, for present purposes, are so-called "meet and confer" states, which permit or require public employers to meet and confer with employee representatives but prohibit the employers from entering into collective agreements. *See* Note, 75 Minn. L. Rev. at 1819-20.

[11] The Senate Report includes a nearly identical passage with the exception of the last sentence, which appears only in the House version. *See* S. Rep. 99-159, 99th Cong., 1st Sess. 8 (1985).

in the future, subject, of course, to the minimum standards prescribed elsewhere in the provision. *See* note 3, *supra*. The language of section 207(o)(2) was carefully drawn to accommodate all state law bargaining arrangements, whether collective or individual.

In 1984, slightly over half the States had collective bargaining systems similar to that mandated in the private sector by the NLRA. *See* R. Kearney, note 9, *supra*, at 55. In those States, public employers are required to bargain collectively with their employees over terms such as overtime compensation.[12] As a matter of state law, therefore, public employers in States with NRLA-style labor relations laws may provide compensatory time only pursuant to an agreement with the employees' representative. Subclause (i) of section 207(o)(2)(A), which permits employers to provide compensatory time pursuant to a collective bargaining agreement, plainly conveys Congress' intention not to disturb such formal, NLRA-style arrangements.

In addition to formal "collective bargaining agreements," subclause (i) also authorizes employers to provide compensatory time pursuant to a "memorandum of understanding, or any other agreement" with the employees' representative. 29 U.S.C. § 207(o)(2)(A)(i). This reference in subclause (i) to less formal agreements reflects Congress' recognition that certain States enforce labor contracts between public employers and employee representatives notwithstanding the absence of formal collective bargaining laws. *See* Note, 75 Minn. L. Rev. at 1819 & n.65. Though the employee "representatives"

---

[12] *See* Note, 75 Minn. L. Rev. at 1840-41 ("In states with [NLRA-style] policies, overtime compensation will almost certainly be a mandatory subject of bargaining. Thus, under state law, the public employer would be required to bargain with the representative over compensatory time and could not unilaterally impose compensatory time policies."); *see also id.* at 1837 & n.158.

in these States are not properly characterized as "recognized" collective bargaining agents, these States nonetheless treat an agreement between public agencies and such representatives as binding. *See* note 13, *infra*.

Subclause (ii) agreements—those between the public employer and individual employees—were plainly designed by Congress to accommodate States that prohibit collective bargaining by some or all public employers. In 1984 at least ten States prohibited public sector collective bargaining altogether. *See* Note, 75 Minn. L. Rev. at 1819-20. Thus, Congress enabled public employers who were prohibited from collective bargaining to continue to provide compensatory time as they always had—pursuant to individual employment agreements with their employees. Congress manifestly did not intend, contrary to petitioners' argument, *see* note 8, *supra*, to impose on public employers a federal collective bargaining obligation at odds with state law.

As noted above, petitioners' interpretation of section 207(o)(2) is based upon the Department of Labor regulations implementing that provision. Specifically, petitioners seize on the statement in the regulation that "[w]here the employees have a representative, the agreement or understanding . . . must be between the representative and the public agency." 29 C.F.R. § 553.23(b)(1). Petitioners contend that this requirement, when coupled with the statement in the regulation that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees," *id.*,[13] makes clear that a public employee's

---

[13] The regulation's statement that a "representative need not be a formal or recognized bargaining agent" is based on the House Report. *See* H.R. Rep. 99-331 at 20. This language, like the statute's reference to a "memorandum of understanding, or any other agreement," see 29 U.S.C. § 207(o)(2)(A)(i), merely seeks to accommodate the States that authorize public employers to bargain and contract with their employees' representative notwithstanding the absence of formal collective bargaining laws.

designation of a representative entitles the employee to cash overtime pay in the absence of a subclause (i) agreement between the employer and the representative.

This argument, however, ignores the fact that the Labor Department expressly intended the compensatory time regulation, like section 207(o) itself, to harmonize with state law. When the regulation was promulgated, the Department explained:

> The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of *whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.*[14]

Read in light of this directive, the regulation thus merely makes explicit what the statute and legislative history implicitly reveal—that state law governs the question of whether employers may avail themselves of subclause (ii), or are instead constrained to reach an agreement with their employees' representative under subclause (i). If employees have a representative as "determined in accordance with State or local law and practices," then the employer can only provide compensatory time pursuant

[14] Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2014-15 (1987) (emphasis added). The Department made this statement in response to comments received from various public employers expressing concern that the draft regulation (which, in relevant part, is identical to the final version) "should operate only where collective bargaining obligations are provided for by State law." *Id.* at 2014. Petitioners assert that the "Department expressly *rejected* this position." Pet. Br. at 30 (emphasis in original). But the fact that the Department did not rewrite the regulation in response to the comment does not mean that it rejected the comment; indeed, in light of the Department's assertion that state law governs the issue of whether the employees have a representative, it is clear that the Department believed that the concerns raised in the comment and the proposed regulation were in harmony.

to an agreement with that representative.[15] Here, however, petitioners are precluded by Texas law from having a representative with authority to enter a subclause (i) compensatory time agreement on their behalf. And in the absence of such an agreement, individual compensatory time agreements are authorized under subclause (ii) of the statute.

Moreover, petitioners' interpretation of the regulations would be a prescription for chaos in public sector labor relations in States like Texas. If, as petitioners contend, the statute authorizes each employee to "designate" a representative without regard to state law, it is conceivable that, in the words of one comment to the proposed regulation, "an employer could find itself dealing with a different representative for each employee." 52 Fed. Reg. at 2014. Only by interpreting "representative" consistent with state law can the practical problems presented by non-exclusive representation be avoided. *Cf.* Note, 75 Minn. L. Rev. at 1841-42.

Finally, interpreting section 207(o)(2)(A) and its implementing regulation to respect state law has the virtue of assigning a meaningful purpose to subclause (ii). If any public employee, either individually or as part of a group, and despite any state law restrictions, can "designate" an "FLSA representative," and thereby impose on the employer a duty either to negotiate with the representative or to pay cash, subclause (ii) serves no

[15] Petitioners attempt to avoid the Labor Department's state law comment by suggesting that "state law may be relevant in determining when employees 'have designated a representative.'" Pet. Br. at 31. The Department's statement, however, says that state law determines "whether employees *have a representative*," 52 Fed. Reg. at 2015 (emphasis added), not whether they have designated one. Petitioners' effort to equate the employees' designation of a representative with the existence of a representative ignores the fact that some public employees, as a matter of state law, cannot have a "representative," whether they have "designated" one or not.

purpose. Divorced from the rationalizing effect of state law, petitioners' interpretation of section 207(o)(2)(A) would effectively reduce the scope of subclause (ii) to a class of employees who choose not to designate a representative, which, as we shall demonstrate, was hardly the function intended by its framers.

To justify assigning to subclause (ii) such a hollow function, petitioners claim that subclause (ii) agreements would otherwise permit a public employer "unilaterally" to "impose" upon employees compensatory time arrangements of the employer's own choosing. *See* Pet. Br. at 6, 20-21. Indeed, in discussing the implementing regulation, petitioners argue: "An employer cannot, as respondents have done, impose its chosen compensatory time policy on those of its employees who have designated a representative by treating its policy as individual agreements that have been made conditions of employment for those employees." Pet. Br. at 12. According to petitioners, therefore, any employee can prevent an employer from imposing a compensatory time agreement by simply designating a representative.

Amici's response is twofold. First, the employer cannot dictate any compensatory time agreement of its choosing. As the statute makes clear, all compensatory time agreements, whether under subclause (i) or (ii), must at a minimum conform to the requirements set forth in the statute, including especially the requirement that compensatory time be provided "at a rate of not less than one and one-half hours for each hour" of overtime.[16] *See* 29 U.S.C. § 207(o)(1).

[16] Petitioners assert that only "a negotiated [compensatory time] agreement with the employee's designated representative" provides "a practical guarantee that the terms of the compensatory time arrangement take into account the interests of both the employer and the employees. Absent such agreement there is of course no such assurance." Pet. Br. at 17. This statement ignores the fact that the statute itself prescribes minimum standards that must be included in any compensatory time agreement. *See* note 3, *supra*.

Second, and more importantly, Congress clearly intended subclause (ii) to authorize employers to condition employment on acceptance of specific compensatory time policies. Both the House and Senate Reports, in nearly identical passages, confirm this reading of subclause (ii). The Senate version reads:

> The agreement or understanding to provide time off as compensation for overtime *may take the form of an express condition of employment*, so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection.

S. Rep. 99-159 at 11; *see also* H.R. Rep. 99-331 at 20.[17] It could not be clearer that compensatory time agreements with individual employees may take the form of express conditions of employment.

Having now fully explored the workings of the statute and its implementing regulations, it is clear that they yield the same result. As we have demonstrated above, employers whose employees have a representative, as that term is defined by state law or practice, may provide compensatory time only pursuant to a subclause (i) agreement with that representative. Because subclause (i) is limited by its terms to employees who are covered by an agreement with their representative, it follows that subclause (ii), which applies "in the case of employees not

[17] This authority to include compensatory time as a condition of employment is codified at 29 C.F.R. § 553.23(c)(1). In commenting on the proposed regulation, the National Education Association "argued that the statute gives the employees the right to increase their bargaining power by designating representatives to enter into agreements with employers on the issue of compensatory time," and urged that all references to compensatory time agreements as conditions of employment should be deleted from the regulations. 52 Fed. Reg. at 2015. Relying upon the Committee Reports, the Secretary *rejected* the comment. *Id.*

covered by subclause (i)," authorizes employers to provide compensatory time to all non-represented employees pursuant to the terms of individual employment contracts. Since under Texas state law petitioners cannot and do not have a "representative," the County may avail itself of subclause (ii).

III. PETITIONERS' PROPOSED CONSTRUCTION OF SECTION 207(o) IS PRECLUDED BY THIS COURT'S HOLDING IN *GREGORY v. ASHCROFT*.

Petitioners' proposed construction of section 207(o) fails for another reason. Even if the statute is ambiguous, and even if the Labor Department's implementing regulation truly did authorize public employees to designate compensatory time bargaining representatives notwithstanding contrary state law, petitioners' construction of section 207(o) would nonetheless be precluded by this Court's decision in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

In *Gregory*, this Court held that federal courts will interpret a statute to "upset the usual constitutional balance of federal and state powers" only if Congress "make[s] its intention to do so unmistakably clear in the language of the statute." *Id.* at 2401 (internal quotation omitted).[18] At issue in that case was whether a Missouri state constitutional provision mandating that all judges retire at age 70 violated the Age Discrimination in Employment Act of 1967 ("ADEA"). Concluding that a State's power to set the qualifications of its public officials "is an authority that lies at the heart of representative government . . . [and is] reserved to the States under the Tenth Amendment," *id.* at 2402 (citations and internal quotations omitted), the Court analyzed whether Congress nonetheless intended the ADEA to override this State

[18] *See also United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . . .").

prerogative pursuant to its power under either the Commerce Clause or section 5 of the Fourteenth Amendment. *Id.* at 2404-06. Finding congressional intent to be "ambiguous," the Court concluded: "In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.* at 2406.

Under petitioners' proposed construction of section 207(o), Harris County must either enter into compensatory time agreements that state law forbids or pay petitioners cash rather than compensatory time for overtime work. Petitioners' proposed interpretation of the statute would thus clearly have the effect of "upset[ting] the usual balance of federal and state powers" in an area of traditional state governance. *Gregory*, 111 S. Ct. at 2401.[19] Accordingly, that interpretation must be rejected unless supported by a "plain statement" that Congress intended to displace state laws prohibiting public sector collective bargaining agreements concerning compensatory time. *Id.* Because section 207(o) contains no indication—much less an "unmistakably clear" one—that Congress

[19] The power of state and local governments to establish the wage and hour policies for their employees is an "undoubted attribute of state sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), *overruled on other grounds by Garcia*, 469 U.S. at 546-47. The *Usery* Court even addressed the specific issue of overtime compensation: "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and *what compensation will be provided where these employees may be called upon to work overtime.*" *Usery*, 426 U.S. at 845 (emphasis added). As *Gregory* clearly indicates, the notion that certain governmental functions are inherent attributes of state sovereignty survived the Court's decision in *Garcia*, which held only that there are no judicially enforceable constraints on Congress' power under the Commerce Clause to interfere with state regulation of such traditional state governmental functions. *Garcia*, 469 U.S. at 546-47.

intended the upheaval of state public sector labor laws that petitioners advocate, petitioners' proposed construction of section 207(o) must be rejected.[20] *Id.*

The foregoing analysis is not altered by *Chevron*'s rule of judicial deference to agency interpretations of ambiguous statutes. Assuming again that the Labor Department's compensatory time regulation would yield the result petitioners advocate, *Gregory* rather than *Chevron* provides the rule of decision in this case. The *Gregory* plain

[20] The Court in *Gregory* also noted that "[a]pplication of the plain statement rule thus may avoid a potential constitutional problem." 111 S. Ct. at 2403. The rationale for this rule is similar to the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress." *Edward J. De Bartolo Corp. v. Florida Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). In light of *Garcia's* holding that there are no judicially enforceable restraints on Congress' power under the Commerce Clause to regulate state and local public sector employment relations, petitioners' proposed construction of section 207(o) would not appear to raise any "serious constitutional problems." *Id.* In light of *Gregory*, however, and the Court's decision last Term in *New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (invalidating a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that the Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce"), it is not clear whether *Garcia* still provides the appropriate standard for analyzing Tenth Amendment challenges to Congress' authority to interfere with state governmental functions. *See, e.g., The Supreme Court: 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 173 (1992) ("Last Term, in *New York v. United States*, the Court, *although not expressly overruling Garcia*, again struck down part of a congressional act for infringing upon state sovereignty.") (emphasis added). These post-*Garcia* cases thus make it appropriate to apply both the *Gregory* plain statement rule, and the *De Bartolo* rule to this case, and under both rules, petitioners' proposed construction of section 207(o) must be rejected. *See New York*, 112 S. Ct. at 2425 (rejecting interpretation of statute based upon both *Gregory* and *De Bartolo*).

statement rule is designed to "assure[] that the legislature has in fact faced, and intended to bring into issue," the weighty concerns of federalism that must be overcome to warrant federal intrusion into the sovereign realm of the States. 111 S. Ct. at 2401, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation omitted). Indeed, the plain statement rule is especially important in light of *Garcia*, which left to Congress the responsibility for "ensur[ing] that laws that unduly burden the States [are not] promulgated." *Garcia*, 469 U.S. at 556. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 111 S. Ct. at 2403, quoting L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988).

Accordingly, unless it is "absolutely certain," *Gregory*, 111 S. Ct. at 2403, that Congress intended to "upset the usual balance of federal and state powers," *id.* at 2401, a court will not interpret a statute to do so. Yet to defer under *Chevron* to a regulation that would have that effect would be tantamount to empowering an administrative agency to do precisely what this Court, under *Gregory*, will not. In short, when *Gregory* and *Chevron* collide, the federalism values that *Gregory* protects must control.[21]

In addition, as the foregoing discussion makes clear, we believe that Congress' respect for the States' public sector bargaining arrangements is a singular virtue of the compensatory time policy established in section 207(o). That the States have developed a variety of approaches in this area of public sector labor relations is an inevitable, and healthy, concomitant of our federalist "system of dual

[21] *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1788-89 (1991) (O'Connor, J., dissenting) (would invalidate regulations that raise constitutional problems rather than defer to those regulations and be forced to decide the constitutional issue).

sovereignty between the States and Federal Government"; preserving that diversity is itself a weighty basis for favoring the statutory construction that we have advanced. *Gregory*, 111 S. Ct. at 2399; *cf. De Bartolo*, 485 U.S. at 575.

In the most recent federal appellate decision construing section 207(o), however, five judges, dissenting from a majority opinion adopting the statutory constructions that *amici* urge here, decried the "inequitable result" of resting public employees' compensatory time rights "on the *idiosyncrasies of state legislatures.*" *Wilson v. City of Charlotte*, 964 F.2d 1391, 1400 (4th Cir. 1992) (*en banc*) (Ervin, C.J., dissenting) (emphasis added). The dissenters in *Wilson* were incredulous "that Congress intended for employees' rights under the Act to hinge upon the *mere fortuity of geography.*" *Id.* at 1403 (emphasis added). The very essence of federalism, however, is the freedom of the people of the several States—separated only by the "fortuity of geography"—to develop varying solutions to common concerns.

Tocqueville recognized that the federalist system established by the Constitution was a unique innovation of the American founding. *See* 1 A. de Tocqueville, *Democracy in America* 181 (H. Reeve. trans. 1961). Premised on the idea that the government established by the Constitution would be one of delegated and therefore limited powers, "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to insure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia*, 469 U.S. at 572 (Powell, J., dissenting). The Framers' vision of the "balance of power between the States and the Federal Government" was captured in Madison's classic formulation in Federalist No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). The States' "residuary" sovereign powers were to be "inviolable," and the Supreme Court was assigned the crucial role of policing the boundary between the dual State and Federal sovereigns:

> It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, and according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments . . . is a position not likely to be combated.

The Federalist No. 39, at 245-46.

The Court thus fulfilled its proper constitutional role last Term in *New York v. United States*, 112 S. Ct. 2408 (1992), when it invalidated a provision of the Low-Level Radioactive Waste Policy Amendments of 1985. After describing in detail the sources and extent of congressional authority to regulate the States, *id.* at 2417-24, the Court characterized the so-called "take title" provision of the statute as "offer[ing] state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." *Id.* at 2428. The Court held that because either course of action alone

"would be beyond the authority of Congress, . . . it follows that Congress lacks the power to offer the States a choice between the two." *Id.* The Court concluded that "[w]hether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 2429.[22]

Consistent though the Court's decision in *New York v. United States* was with the Founders' design, there is considerable tension between that decision and some of the Court's earlier pronouncements on its role in adjudicating federalism-based challenges to congressional enactments. Specifically, the Court's invalidation in *New York v. United States* of the take title provision on the ground that it was beyond Congress' authority to regulate the States under the Commerce Clause appears to conflict with the Court's earlier holding in *Garcia* that the States must rely on the national political process, and not the Court, for protection against burdensome congressional exercises of the commerce power. *Garcia*, 469 U.S. at 554.[23]

---

[22] Because the State of New York originally supported the provisions it was now challenging, the Court was asked the question: "How can a federal statute be found an unconstitutional infringement of State sovereignty when state officials consented to the statute's enactment?" 112 S. Ct. at 2431. Discounting the notion that the constitutionality of a federal statute affecting the States depends upon the States' reaction to it, the Court ruled that "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *Id.*

[23] The difficulty of reconciling these two cases was noted by the dissenting Justices in *New York v. United States*, who viewed the majority's holding as "especially unpersuasive after *Garcia*" and stated that "the more appropriate analysis should flow from *Garcia*." 112 S. Ct. at 2443 (White, J., dissenting).

Concluding that the "political process ensures that laws that unduly burden the States will not be promulgated," 469 U.S. at 556,[24] the *Garcia* Court reserved to itself an extremely limited scope of judicial constitutional review of congressional regulation of State activities under the Commerce Clause. Indeed, following *Garcia*, the Court held that federal regulation of State activities may be invalid under the Tenth Amendment only if a State alleges and proves "some extraordinary defects in the national political process." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). Without identifying or defining the defects that might invalidate a congressional exercise of the commerce power, the *Baker* Court intimated that a State might be required to show that it "was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

Amici respectfully submit that the highly deferential approach to reviewing congressional regulation of States and localities announced in *Garcia* and *Baker* is at odds

---

[24] As a purely factual matter, the States would have ample reason to question the validity of this assertion. One recent study has determined that during the 1980s, Congress enacted twenty-seven new laws or major amendments "which imposed significant additional regulatory burdens on state or local governments." Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later* at IV-6 (forthcoming 1993) (copy lodged with the Clerk of the Court and served on the parties). Fully nineteen of those twenty-seven new programs were passed after *Garcia*, *see id.* at 3-5, and while it cannot be shown that the Court's decision directly inspired these enactments, it would appear to have at least emboldened an already active Congress. The ACIR report, moreover, includes only what it considers to be significant new enactments; Congress actually enacted many more than twenty-seven new mandates. *See, e.g.*, John Kincaid, "Developments in Federal-State Relations, 1990-91," in *The Book of the States: 1992-93 Edition* 616 (The Council of State Governments 1992) (noting that "in 1990 and 1991 the Congress enacted, and the president signed, at least 23 mandates").

with the Framers' vision of our federalist system of dual sovereignty and with this Court's more recent pronouncements. Last Term's decision in *New York v. United States* is a welcome sign that the Court recognizes that our federalist structure enhances democratic self-government. *See New York*, 112 S.Ct. at 2431-32 ("'federalism secures to citizens the liberties that derive from the diffusion of sovereign power'") (quoting *Coleman v. Thompson*, 111 S.Ct. 2546, 2570 (1991) (Blackmun, J., dissenting)). Petitioners' construction of section 207(o) should be rejected because it conflicts with the constitutional principles recently reaffirmed in *New York*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
WILLIAM L. MCGRATH
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

January 15, 1993